DOCUMENT RESUME

ED 141 880 EA 009 677

AUTHOR Boynton, Jason E.
TITLE Termination of Teacher Employment: A Schoolman's Views and Cases.
INSTITUTION New Hampshire School Boards Association, Durham.
PUB DATE 76
NOTE 98p.
AVAILABLE FROM New Hampshire School Boards Association, Morrill Hall, Durham, New Hampshire 03824 ($3.00)

EDRS PRICE MF-$0.83 HC-$4.67 Plus Postage.
DESCRIPTORS *Board of Education Policy; Contracts; *Court Cases; Due Process; Elementary Secondary Education; Guidelines; *School Law; *Teacher Dismissal; *Teacher Employment; *Tenure
IDENTIFIERS *New Hampshire

ABSTRACT

This monograph is intended to aid school board members and school administrators in understanding the legal requirements and implications of teacher dismissal and nonrenewal proceedings. The first section examines the legal requirements governing teacher dismissal and nonrenewal in a variety of circumstances, focusing in turn on dismissal during the term of a contract, contract nonrenewal in the first year of employment, nonrenewal in the second or third year of employment, and nonrenewal after three or more years of employment. The second section, which makes up most of the monograph, summarizes eight court cases relevant to teacher dismissal and nonrenewal. The appendix presents the New Hampshire State Board of Education's policy governing administrative hearing procedures, model rules and procedures for local school board dismissal hearings, and a model record of a local school board's hearing and decision in a teacher dismissal case. Although the monograph is designed for use by school officials in New Hampshire, much of its content will be of use to those in other states as well. (JG)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED141880

U S DEPARTMENT OF HEALTH
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY

New Hampshire School Boards Assn.

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER

TERMINATION OF TEACHER EMPLOYMENT

A Schoolman's Views and Cases

by

Jason E. Boynton

Published By
New Hampshire School Boards Association
Durham, New Hampshire
1976

EA 009 677

© Copyright, 1976, by Jason E. Boynton

All rights reserved.
Manufactured in the United States of America

TABLE OF CONTENTS

Foreword 5

Author's Preface 7

Termination of Teacher Employment 9
- Dismissal 10
- Nonrenewal of Teacher Contracts 19
- Review of Nonrenewal Decisions by State Board 23
- Enforcement of Employment Contracts 24

Cases
- Case Number 1. 31
  Board of Regents of State Colleges et al. v. Roth (Supreme Court of the United States)
- Case Number 2. 55
  Brief by Bradley Kidder re Perry et al. vs. Sindermann (United States Supreme Court)
- Case Number 3. 57
  G. Alda Spencer v. Laconia School District (1966)
- Case Number 4. 63
  Patricia Drown v. Portsmouth School District et al. (United States Court of Appeals, First Circuit)
- Case Number 5. 71
  Richard L. Stoneman vs. Tamworth School District, Brief by Bradley Kidder, Esq.
- Case Number 6. 73
  Donald W. Hawthorne vs. Dresden School District (1974)
- Case Number 7. 75
  Ellen Farrelly et a. vs. Timberlane Regional School District (1974)
- Case Number 8. 81
  Donald R. Chase v. Fall Mountain Regional School District et al. (1971)

Appendix
- Appendix A. 99
  State Board Policy for Administrative Hearing Procedures under New Hampshire RSA 189
- Appendix B. 105
  Rules and Procedures Governing a Dismissal Hearing
- Appendix C. 107
  Record of Hearing and Decision of Local Board

Foreword

As counsel to the New Hampshire School Boards Association and numerous school boards throughout the State, and also as a former school board member and chairman, I would urge all school board members and school administrators to read Mr. Boynton's study carefully and to keep it available for ready reference. He has done an outstanding job in highlighting some of the many problems we are and will be faced with. He has not attempted in any way to give official legal opinions but has demonstrated a keen insight and understanding in discussing matters with which he has had considerable experience. I agree one hundred percent that one must first recognize a problem before it can be solved, that recognition should come early, and if it appears that it might be serious, expert advice and guidance should be sought.

Jason Boynton should be commended for such a comprehensive and understandable presentation of some of the many problems involved in Termination of Teacher Contracts.

Arthur H. Nighswander
Laconia, New Hampshire
13 February 1976

Author's Preface

The author is an experienced school administrator and a college teacher, not a lawyer. This monograph is designed to be helpful to school board members and school administrators who must deal with staffing problems on a day-to-day basis. The author's recommendations or points of view are based on a special interest in school law, but they are not legal opinions. It is hoped that the reader will bear in mind the importance of competent and timely legal counsel prior to the enactment or implementation of any policy which may have legal complications.

School board members who vote on policy matters and who participate in decision making, need to be well acquainted with the legal implications of their acts. School administrators are expected to recommend policy, and make decisions in accordance with enacted policies. All such persons must be well informed and alert to those situations which require the legal services of a trained and experienced school attorney.

Several cases have been included to provide the reader with a convenient and direct access to court decisions. A careful reading of these cases can be most instructive—look for the facts, key issues, and the prospective guidance sometimes offered the reader who wishes to avoid unnecessary litigation.

The writer wishes to identify and express his appreciation to several New Hampshire attorneys who have helped him understand some of the legal aspects of school administration:

William Beckett
David Bradley
John Driscoll
Alan Hall
Franklin Hollis
Bradley Kidder
Jack Middleton
Arthur Nighswander
Wilfred Sanders
Louis Soule
Fred Upton
Richard Upton

Helpful suggestions were solicited and received from graduate students and other interested persons. My appreciation to them all and a special thanks to members of my own family, Cynthia Dore, Aileen Katz, Betty Pallas, Superintendent Douglass Roberts, Attorney Bradley Kidder, Attorney Arthur Nighswander, Attorney Jay C. Boynton, and my friend and colleague Dr. Joseph Petroski.

Jason E. Boynton
Durham, New Hampshire
February 1976

TERMINATION OF TEACHER EMPLOYMENT

Not just any title would appropriately cover the sub-topics which relate to teacher dismissal and the nonrenewal of teacher contracts. Whether or not a termination is lawful depends very much on the circumstances involved in a specific case; for example, there are dismissals during the term of a contract, nonrenewal of a probationary teacher's contract and nonrenewal of contracts of tenured teachers.

A teacher who is being tested with respect to character, qualifications and performance is a probationary teacher. Such a teacher is usually in his or her first few years of employment within a district and has not acquired a property interest in employment beyond the period of employment specified in the contract.

A tenured teacher is one who, having been tested as a probationary teacher, has been found acceptable and one who, because of some statute, contractual obligation, policy or practice has acquired some rights with respect to employment beyond the term of the existing contract. Such a teacher has acquired property rights to continued employment. Although not absolute, these rights may not be abridged except in accordance with specified procedures and in some cases only for specified or substantial reasons.

When either an oral or written contract exists concerning a fixed period of time and when the contract is terminated prior to the expiration of that period, then it is a dismissal case and the teacher has constitutional rights, contractual rights and statutory rights as well.

The statutes vary from state to state, but in New Hampshire the statutes deal differently with four fact situations:

1. Dismissal during the term of a contract;
2. Nonrenewal: teacher in first year of employment in the district;
3. Nonrenewal: teacher in second or third year of employment in the district;
4. Nonrenewal: teacher who has taught for three or more years in the district.

New Hampshire statutes set the date as March 15 when a teacher must have taught for the specified years within the district to meet the fact situations cited above. The N.H. statutes which govern contract **renewal** do not expressly limit the causes of non-renewal. Instead there are procedures which must be followed depending on the length of service involved. However, with respect to **dismissal** the causes are limited in addition to the procedural requirements which are mandated, not just suggested. It is most important to note the distinction between dismissal and nonrenewal. Dismissal is the action taken when an employment contract is terminated during the term of the contract. Nonrenewal is a term reserved for situations when no new contract is issued following the completion of an employment contract.

As has been noted, there are state statutes which must be followed when teachers are dismissed or when contracts, under certain conditions, are not renewed. In addition to state laws there are constitutional limitations, court interpretations of written law and case law vis-a-vis contracts. In other words, there are many aspects to be considered in reaching decisions to terminate the employment of teachers, not the least of which are the provisions of the existing contract.

First Fact Situation - Dismissal

Dismissal During the Term of a Contract

In a way the greatest job security (tenure) comes to a New Hampshire teacher during the period the contract is in force. No consideration is given in this fact situation to the number of prior years of service to the district.

According to New Hampshire Revised Statutes Annotated:

> "189:13 Dismissal of Teacher. The school board may dismiss any teacher found by them to be immoral or incompetent, or one who shall not conform to regulations prescribed; provided that no teacher shall be so dismissed before the expiration of the period for which said teacher was engaged without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing."

The enforcement of RSA 189:13 is also prescribed by statute:

> "189:14 Liability of District. The district shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of the preceding section, to the extent of full salary for the period for which such teacher was engaged."

Before giving further consideration to the specific aspects of RSA 189:13 and RSA 189:14, we must surely note that these two sections apply only to teachers who have been employed for a fixed period and only in instances when such teachers are **dismissed** prior to the expiration of that period.

The rights of the teacher dismissed during the term of employment have become statutory rights. However, they do, to a considerable degree, reflect the obligations of contracts with court-enforceable remedies for non-performance.

If a teacher were dismissed during the term of a contract, the teacher would be denied the gainful employment promised by the contract; it would be a deprivation of property – a critical consideration when we focus on the 14th Amendment rights of the U.S. Constitution.

RSA 189:13 will be separated into major components for the purpose of this treatise. "The school board may dismiss any teacher found by them to be

immoral or incompetent, or one who shall not conform to regulations prescribed. . ." This section needs to be reviewed very carefully:

- Since the statute specifies "school board may dismiss", it is interpreted to mean that dismissal requires corporate school board action.
- The "found by them" language has meaning in that the exercise of discretion is the board's responsibility. Also, the discretion would be abused, at least in this writer's opinion, unless the board inquires into the circumstances so as to have a reasonable basis for reaching the conclusion ("found by them"). As a practical matter, the investigation will, in most instances, have been conducted by agents of the board. However, the board will have ample opportunity to hear evidence, make findings of fact and reach its decision, because a prior hearing is required. A thorough investigation should certainly be undertaken, and to avoid prejudice the board may choose to separate its exercise of discretion from the actual investigation. The superintendent, or others whom he designates, may make and support a recommendation to the board. In this way the board avoids becoming directly involved in judging its own views. This does not mean that complaints must be kept from the board, or that the board must avoid any knowledge of the circumstances. It does mean that the board should, in the case of teacher dismissals, act in a quasi-judicial role as an unbiased decision maker. Even the appearance of having prematurely decided the matter should be avoided.
- The understanding of "immoral or incompetent, or one who shall not conform to regulations prescribed. . ." is critical. Since the reasons have been specified, this section limits the reasons to those specified. In other words, unless the reason comes within the meaning of one of the three (immorality, incompetence, or violation of prescribed regulations), it will not suffice as a reason for dismissal during the term of a contract.
- We will not consider the remainder of RSA 189:13, the substance of which is ". . .without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing." We must keep in mind that RSA 189:13 is concerned with dismissal; not nonrenewal or reappointment. Any dismissal ". . .before the expiration of the period for which said teacher was engaged. . ." has procedural requirements which must be followed without exception; namely, prior notice of the cause, and a prior "full and fair" hearing. This section does not specify that the notice must be in writing, but it could be very important to have a record if there is subsequent litigation. The notice in this fact situation (dismissal during the term of a contract) is more than a warning of dismissal. It is required that the cause or causes for the dismissal be included in the notice; such cause must be one or more of the three acceptable causes cited in the statute. In most cases, the cause will be the reason why the administration is requesting the board to take action and, since the purpose of the notice is to give the teacher an opportunity to respond, the language will need

to be quite specific. It is important that the school attorney assist with the preparation of such a "notice of cause."

Apparently, the board could, even if not in agreement with its chief administrator, take action to dismiss during the term of the contract. The problem, and it is a real one, comes when the board finds itself in the position of both asking for the action, presenting its own evidence, and deciding whether or not the action sought is appropriate. This is not an impossible situation, or one that lacks a sound basis in reason. The board, being acquainted with the circumstances, might initiate dismissal proceedings and schedule a hearing, at which time the teacher would be given an opportunity to refute the charges or to otherwise influence the board with respect to the final decision. The board does have the power to reverse an earlier decision, and **perhaps** the contention that there was at least a tentative decision prior to the hearing **may** not become a major issue.

The "full and fair" hearing should be structured in accordance with the advice of legal counsel. When the hearing is carefully planned, and correctly conducted, it will lessen the likelihood of problems with future litigation.[1] The requirements of such a hearing will include the following:

1. Timely notice and a specification of the cause or causes.
2. The opportunity for the teacher to be represented by counsel (the notice should advise the teacher accordingly).
3. The teacher must be permitted to present evidence, and must have a reasonable opportunity to know the claims of the school officials.
4. The evidence supporting dismissal must be presented, and the teacher given an opportunity to cross-examine witnesses.
5. The decision by the board must be based on findings of fact as determined from the evidence presented, and the authority so exercised must be consistent with the fundamental principles of due process of law.

There may be other requirements, and an attorney, prepared by training and experience, should be engaged to advise the board and to provide assistance in the conduct of the hearing. Court rules of evidence and of procedure need not be strictly followed, but it is not enough just to have good intentions. In other words, school officials are authorized to use discretion, but not to abuse it, whether intentionally or unintentionally. The decision must be fairly reached. The terms "fair hearing" and "full hearing" have legal interpretations. (2F Supp. 29C, 291)[2]

---

[1] See Appendix: "State Board Policy for Administrative Hearing Procedures under New Hampshire RSA 189"; Attorney Bradley Kidder's "Rules and Procedures Governing a Dismissal Hearing"; and his "Record of Hearing and Decision of Local Board".

[2] Hayes v. Cape Henlopen School District 341 F Supp. 827 (1972): "It is axiomatic that individuals who voluntarily refuse to participate in a hearing offered by an administrative board waives his procedural due process rights to a hearing and is precluded from subsequently challenging the board for failing to provide him with a hearing."

* School officials must know how the courts have interpreted the three specified causes; namely, immoral, incompetent, and failure to conform to regulations prescribed.

These meanings must be understood, and at the same time one must realize that in some future case a court may extend or limit these meanings.

IMMORALITY

Immoral? Some say, "nothing is immoral today." Black's Law Dictionary (Revised 4th Edition, pg. 885) offers some uncertain assistance:

> "...Contrary to good morals (of course, you have to know what's morally good); inconsistent with the rules and principles of morality (same problem); ...inimical to public welfare according to the standards of a given community as expressed in law or otherwise (subject to a court so finding)[1]..."

A stronger definition can be found in case law: "...Morally evil; impure; unprincipled; vicious; or dissolute. U.S. v. One Book, entitled *Contraception* by Marie C. Stopes, D.C. N.Y. 51 F2d 525, 527."

If one presses for meaning, "dissolute" means "indifferent to moral restraints; given over to dissipation; licentious..." according to the *American College Dictionary* published by Random House. And from the same source "unprincipled" means "lacking in moral principles..."; "vicious" means "...characterized by vice or immorality"; "vice" means "an immoral or evil habit or practice"; "licentious" means "unrestrained by law or morality."

To get to the point, some acts considered immoral are also unlawful and to that extent an unlawful, immoral act would surely have standing as a cause for dismissal. Other acts which were found to be below the standards set by a given community, although subject to a court's finding, would also, this writer believes, sustain a dismissal during the term of a contract. However, the problems are obvious when using immorality as a cause for dismissal. It might be immoral to some and not found by a court to be below the standards set by law or the standards of the community. Also, one may question if the conduct must be related adversely to the intended outcome of education. Attorney Arthur Nighswander has written with respect to this matter: "I have always thought that immorality in the community would be a difficult basis on which to justify a dismissal unless you could tie this to incompetency in the classroom. If acts thought by some to be immoral were found to interfere with the needed relationships between a teacher and his student, then incompetence could be used either as the only cause or as an additional cause. The shift from immorality, as a cause for dismissal, to incompetency will make very different demands with respect to the evidence required."

[1] Parentheses added by Jay E. Boynton.

INCOMPETENCY

Incompetency has been broadly construed. The courts generally consider incompetency and inefficiency as closely allied terms. Incompetency as a generic term includes:

> "unfitness, inability, incapacity, lack of legal qualification, lack of intellectual, physical or moral qualification, lack of personal characteristics."

Usually, whether it is unfitness or the lack of certain qualifications, there will be a related outcome; i.e. one will have failed to an unacceptable degree to discharge the required duties or have failed to accomplish the effect intended or desired. In fact, the proof of incompetency or inefficiency may center on the unacceptability of the consequences.

For a more complete understanding of incompetency one is directed to 4 ALR 3d 1090. The following clues coming in part from those annotations should be helpful.

Incompetency Sustained

1. Allegations supported by evidence of inability to spell commonly used English words or to control students (225 So 2d 62).
2. Unfavorable psychiatric exam (304 N.Y.S. 2d 486).
3. Drug addiction (318 Y.Y.S. 2d 163).
4. Teacher did not know subject, unable to arouse and hold interest of pupils and maintain discipline (123 A2 747) (Conn. 1956).
5. Teacher refused to answer questions asked by the superintendent to determine fitness to teach (did not cooperate with superiors).
6. Evidence that teacher had taken school funds (225 So 2d 62).
7. Teacher's remarks to mixed class regarding sex, virginity, premarital sex were factors among others affecting competency (238 So 2d 121).
8. Teacher knew subject matter, but was not able to control or discipline students.

Incompetency Not Sustained

1. Various allegations with respect to incompetency (must have proof as well).
2. Vagueness would be a bar to dismissal.
3. Insubstantial defects would bar dismissal.
4. Mere physical disability, if temporary, would not be grounds for incompetency (299 A2 277).
5. Letters to newspapers criticizing board and superintendent, in absence of false statements knowingly or recklessly made (391 U.S. 563).
6. Conduct, absent the existence of a rule or regulation violated (415 SW 2d 607).
7. Prior misconduct with evidence would not stand with respect to cancellation of a contract for future services – such evidence might

form a basis for non-renewal (459 P2d 834). However, if the gross inefficiency existed prior to the contract **and continued after** the date of the contract it would be grounds for dismissal (74 NE 2d 261).

8. No convincing evidence other than parent complaints.

If incompetency is to stand as a cause for dismissal, there must be evidence of some fault. Generally the fault will be shown to have caused some undesirable outcome or to have failed to provide the desired effect.

One court is quoted on this important point, "The true meaning of teacher qualifications must be based on the accumulation of contacts, observations, general and special results, and the judgment of a number of people." (95 NE2 19)

FAILURE TO COMPLY WITH REGULATIONS

In addition to immorality and incompetence, the failure to comply with regulations prescribed (the third cause specified for dismissal) requires some interpretation.

Two points of significance: (1) the regulation must be a lawful prescribed regulation and (2) there must have been proof that the regulation was violated. Obviously, we must be able to separate the lawful from the unlawful in terms of prescribed regulations. If prescribed means "laid down" or "set forth", and it does, we can now attempt a test for lawful regulations. A lawful regulation must satisfy at least all of the following:

1. It must not be vague or of uncertain meaning.
2. It must not be constitutionally impermissible in terms of First Amendment rights or Fourteenth Amendment's due process.
3. It must not have been outside the powers or duties of those who enacted or prescribed the regulation.

Since other statutes set forth requirements for legal school board meetings and since boards, as corporate bodies, enact regulations, it is also necessary to follow such statutes. An illustration is provided:

> "RSA 189:15 Regulations. The school board may, unless otherwise provided by statute or state board regulations prescribe regulations for the attendance upon, and for the management, classification and discipline of schools, and such regulations, when recorded in the official records of the school board, shall be binding upon pupils and teachers." (New Hampshire Revised Statutes Annotated)

Also there are statutory requirements in the so-called Right-To-Know Law (RSA 91-A) which must be followed whenever a board takes action as a corporate body. (See Stoneman v. Tamworth School District, 320 A2d 657; a brief is included herewith).

Failure to comply with a lawful, prescribed regulation is probably the easiest cause to substantiate, but it is proof that is required, not merely allegations.[4] Sometimes insubordination is used as a term meaning failure to

[4] The importance of recording incidents and maintaining a complete file can hardly be overstated. The failure to do so has presented many problems with respect to hearings and the reviews of such hearings.

comply with regulations, but this is an oversimplification. The "bronx cheer" might be insubordinate but not of itself in violation of a prescribed regulation. Probably enough bronx cheers as insubordination might be sufficient to support incompetence, but that is a different cause, which we have already considered.

School administrators, when acting in accordance with school board policy or in response to their official responsibilities, may prescribe regulations. Such regulations would need to be set forth, i.e. communicated to those who are expected to comply.

Employment as a teacher, contractual or otherwise is prohibited unless the person involved complies with the oath requirement:

> "RSA 191:2 Oath Required. No person shall be employed or associated in any capacity, directly or indirectly, in teaching in public or state approved schools or in any state institution until he shall make and subscribe the oath or declaration as prescribed by part 2, Article 84 of the constitution of New Hampshire and any such person who violates said oath after taking the same shall be forthwith dismissed from the office or position involved." (New Hampshire Statutes Annotated)
>
> The form of the oath as prescribed by the New Hampshire Constitution, Part 2, Art. 84: "I, A.B., do solemnly swear, that I will bear faith and true allegiance to the United States of America and the State of New Hampshire, and will support the constitutions thereof. So help me God.
>
> "I, A.B., do solemnly and sincerely swear and affirm that I will faithfully and impartially discharge and perform all the duties incumbent on me as _____ according to the best of my abilities, agreeably to the rules and regulations of this constitution and laws of the state of New Hampshire. So help me God."

This sidelight aspect of teacher dismissal is not commonly considered, but the compliance with the laws of New Hampshire is required on penalty of dismissal. In this regard the dismissal would not be at the discretion of the board but a duty assigned by statute to the attorney general (RSA 191:4). The application of this statute may well be in conflict with due process. The attorney general will certainly know about such problems.

Now to return to RSA 189:13 or, more especially, the enforcement of that section as set forth in RSA 189:14.

If a school board violates RSA 189:13, the district becomes liable "to the extent of full salary for the period for which such teacher was engaged."

The liability for full salary has been interpreted to fix the outside limit of the district's obligation. A person who had been dismissed in violation of RSA 189:13 would be expected to look for alternative employment and, if so employed, the district's liability would be reduced by the amounts earned. If the teacher refused available work of the same kind as that required by the contract, the courts might lessen the district's liability by what the earnings could have been. The idea is to make the injured party "whole"; i.e., return to the condition which would have existed if the contract had not been breached

– if the teacher had not been unlawfully dismissed during the term of the contract.

In passing we may note that the latin term "assumpsit" means "he promised". An action of assumpsit is a legal action taken to recover damages for the non-performance of a contract.

Before dealing with the constitutional aspects of employment termination, there is one further point to be raised: namely, what if a teacher refuses to perform according to an existing contract? May such a teacher be dismissed by the school board in view of the three (and only three) acceptable reasons for dismissal?

This question can be a very important one for the employer who contracts with a replacement only to have the person first employed return. The financial consequences would not be without impact, especially if many teachers abandoned their contracts within one school district and then returned after their replacements had been engaged.

If the employee's breach is a material breach, it **excuses** any contractual obligation on the part of the employer. However, the employer must be free of any fault with respect to the contract which has been breached. This, although not a cause for dismissal, does in effect remove the employer's obligation to those employees who breach their contract. The breach on the part of the employee must have been a material breach, and the advice of counsel should certainly be followed by school officials faced with a problem of this nature. (The reader's attention is directed to Farrelly v. Timberlane Regional School District, 324 A2 723, which case is included herewith).

In summary, the New Hampshire statutes require strict compliance with specified procedures and limit the reasons for dismissal during the term of a contract. In general, compliance with the statutes relating to dismissal will insure compliance with the United States Constitutional restraints. We will next discuss those restraints.

Constitutional Considerations – Termination of Employment

Although New Hampshire Statutes seemingly parallel the constitutional requirements, some state statutes would be less protective. In any case the constitutional restraints require no support from statutes to be enforceable. We will find that "due process" must be taken into account regardless of whether it is a dismissal or a nonrenewal case being considered.

Public education is a state function, and school boards, although elected locally, are state officials (trustees).

United States Constitution

"Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ." (emphasis added)

The Fourteenth Amendment's due process clause made some of the provisions of the Bill of Rights applicable to state action. It is clear that the First Amendment rights have been so included.

United States Constitution

"Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

On a case by case basis the courts have included such other provisions of the Bill of Rights as have been found to be fundamental to the principles of liberty and justice – "those principles implicit in the concept of ordered liberty." (Polko v. Conn., 302 US 319, 1947)

The Fourteenth Amendment's due process clause, with its substantive and procedural protection, and the equal protection clause of that same Amendment certainly have been applied to teacher dismissal disputes.

Due process is required when there is some deprivation of "life, liberty or property". Note the language of the amendment: ". . .nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

It is unnecessary to explain the deprivation of life. However, a person's rights to property and liberty may need some explanation. Certainly liberty means more than freedom from physical restraint. To paraphrase the United States Supreme Court, it includes the following rights:

1. To contract.
2. To engage in lawful occupations.
3. The right to marry, establish a home, and bring up children.
4. The right to worship according to one's conscience.
5. The right to acquire useful knowledge, and
6. The right to enjoy privileges essential to the pursuit of happiness with its uncertain and expansive possibilities.

These rights are not absolute. They may be restricted, **but** a right shall not be abridged without due process. Both substantive and procedural due process must be provided.

Substantive due process involves a test of reasonableness. Is it reasonable in the light of a governmental interest to deny an individual his or her rights or liberties? A distinction is made between fundamental rights and the more general liberties. Fundamental rights certainly include the rights guaranteed by the First Amendment and if, for example, the freedom of speech is to be abridged, the courts will require a "compelling state purpose". There must not be some acceptable alternative or the state action will not be sustained. If instead of a fundamental right, the matter relates to some lesser right (some

courts consider length of hair or the right to wear or not to wear some item of clothing as lesser rights) it may only be necessary to show a nexus – a relationship – to the governmental interest. In other words substantive due process is a determination of the reasonableness of the state action which restricts individual rights.

Procedural due process is always required when there is a deprivation of liberty or property. If the substantive issue is decided in favor of the governmental interest, then the government must have provided fair treatment to the individual involved. The specific requirements of procedural due process will vary depending upon the gravity of the deprivation, but due process will be required unless the deprivation is minute (de minimis).

A deprivation of property would be the taking of one's possessions or the denial of an acquired benefit. In the case of dismissal during the term of a contract, the teacher is being denied employment which had been acquired by contract. There was a property interest in employment.

Upon reflection the reader must agree that RSA 189:13 takes care of substantive due process by limiting the causes for dismissal and provides fair treatment or procedural due process as well. We must review the nonrenewal language to see if the New Hampshire statutes have completely covered Constitutional restraints.

Nonrenewal of Teacher Contracts

We have extensively considered dismissal – the termination of employment during the term of the contract. That covers the first fact situation. The constitutional restraints have been described. We will now be concerned with the last three fact situations, all of which have to do with the nonrenewal of contracts.

The Second Fact Situation

Nonrenewal: Teacher in First Year of Employment in the District

The second fact situation involves a teacher who has not completed a full year's employment by March 15 of a given year. The teacher is employed as a first year teacher in the district.

The nonrenewal of a first contract is not covered by New Hampshire statutes. Nevertheless, there are constitutional restraints. The nonrenewal must not be for a reason which unlawfully violates the constitutional rights of the person nor may it be arbitrary or capricious in violation of the due process clause of the Fourteenth Amendment.

There follows a synopsis of Drown II (Drown v. Portsmouth School District, 435 F2d 1182) which was prepared by John Driscoll, Esquire. The synopsis sets forth the Federal Court of Appeals (First Circuit) interpretation of arbitrary or capricious reasons for nonrenewal.

DROWN VS. PORTSMOUTH SCHOOL DISTRICT

Decided December 1, 1971

When Drown was decided upon the first time by the Circuit Court of Appeals, the Court ruled that a nontenured teacher was entitled to a statement of reasons for the nonrenewal of her teaching contract as a matter of procedural due process under the Fourteenth Amendment. Having sent the teacher reasons, she appealed from the District Court's Dismissal of her claim that the stated reasons were arbitrary and capricious in violation of the Fourteenth Amendment.

One of the reasons stated that she had been "uncooperative, disregarding schedules and not accepting direction."

The opinion of the Court defines what it considers "arbitrary and capricious" reasons.

Reasons for non-renewal must not be arbitrary and capricious. A reason may be such in any one of three ways:

A. Unrelated to the educational process or to working relationships within the educational institution.

B. Trivial, e.g. minor infractions of rules or regulations.

C. Wholly unsupported by a "basis in uncontested fact either in the statement of reasons or in the teacher's file."

In order to support a claim in Federal Court that a non-renewal was arbitrary and capricious "a teacher must at least attack each of the reasons on one of the grounds indicated above".

The Court said that, "It is not arbitrary for a school board to value a spirit of cooperation within a department."

On the point of "trivial reasons" the Court said, "But this is indeed a delicate judgment, and a court would be loath to interfere except in egregious cases."

American Heritage Dictionary defines "egregious": Adj. Outstandingly bad; blatant; outrageous. (L. egregius, "Standing out from the herd")."

(A synopsis of Drown II by John C. Driscoll, Esquire by letter to Jay Boynton dated December 9, 1971)

Since Drown v. Portsmouth School District, 451 F2d 1106, is included for case study, the sequence of Drown I and Drown II needs to be understood. The Federal Appeals (First circuit) first responded by requiring reasons. The reasons were provided.

And then in Drown II the First Circuit was asked to decide whether or not the reasons given were in violation of the due process clause of the Fourteenth Amendment. The United States Supreme Court subsequently decided in Board of Regents of State Colleges et al v. Roth (408 US 564, 567/1972) that probationary teachers were not in certain situations entitled to a statement of the reasons. (See Board of Regents of State Colleges et. al. v. Roth, which case is included with this treatise).

The rights of a first year teacher with respect to contract renewal, absent

any statutory requirement, are therefore: the right to renewal if the reason for nonrenewal is constitutionally impermissible as a violation of individual rights including the right to due process quaranteed by the Fourteenth Amendment.

The Third Fact Situation

Nonrenewal: Teacher in Second or Third Year of Employment in the District

The teacher has, by March 15 of a given year, taught for one year in the district. Such a teacher is entitled to notice by March 15 (notice that the contract will not be renewed). This entitlement is statutory:

> RSA 189:14-a (quoted in part) "Failure to be Renominated or Re-elected. Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or re-elected."

General aspects need to be noted. The date is not advisory, but mandated by statute and the notice is required regardless of whether it is the superintendent who decides not to renominate or the school board, as a corporate body, that chooses not to re-elect. It seems not sufficient to advise the teacher that he or she **may** not be renominated or re-elected, but instead the notice must advise that, as of a date prior to March 15, it has been decided that the contract will not be renewed. This does not mean that the teacher might not be re-elected at a later date, for certainly a board might elect or a superintendent might nominate one who had overcome the deficiencies which prompted the earlier decision.

In this "Third Fact Situation" we must note the statutory requirement of a **written** notice prior to March 15th, as well as the constitutional considerations of the "Second Fact Situation".[1]

Fourth Fact Situation

Nonrenewal: Teacher Who Has Taught Three or More Years in the District

This situation has to do with the nonrenewal of a teacher contract where the teacher involved has taught within the same school district for three or more years (by March 15 of a given year). In this situation it seems clear the legislature realizes that the teacher could have been observed for a period in excess of three years and if reemployed three times by the district the fourth

[1] **Note:** It is not altogether clear if the time requirement (one year) must have been completed prior to March 15th of a given year. As a precautionary measure notice should be given in every case of a nonrenewal.

reelection would be required unless a notice was given by March 15; and further, if a teacher receives such a notice, he or she may request a hearing as well as a statement of the reasons for nonrenewal of the contract and the school board must comply:

> "RSA 189:14-a ". . .Any such teacher who has taught for three or more years in the same school district and who has been so notified may request in writing within five days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected. The school board, upon receipt of said request, shall provide for a hearing on the request to be held within fifteen days. The school board shall issue its decision in writing within fifteen days of the close of the hearing."

We need to carry forward the constitutional requirements of the "Second Fact Situation", the notice required by the "Third Fact Situation", and in addition the hearing requirement with a statement of the reasons as set forth above.

To avoid overly complicating this matter one may highlight the following:

1. The request for a hearing and the request for "reasons" must be in writing and made within five days of receipt of the notice.
2. The reasons have not been limited by statute, but the appropriate exercise of discretion would preclude: no reason, trivial reasons, reasons not related to the outcomes desired or expected, reasons which violate the basic notions of justice or constitutional rights or reasons which have no basis in fact (there must be sufficient supportive evidence, there must have been sufficient inquiry to reasonably establish the validity of the evidence).
3. The teacher must have been observed and supervised, i.e. advised of shortcomings or failures, instructed as to expectations, counseled as to ways in which the deficiencies could be overcome and given a fair period of time to take the corrective action; providing it was reasonable to expect one could overcome the deficiency without an unreasonable delay.*
4. The hearing must be carefully planned and correctly conducted within the fifteen-day period required by statute. The reader is invited to review the "full and fair hearing" requirements which were developed in some detail with regard to dismissal (the first fact situation), for generally the same considerations are involved. In both instances due

* In regard to supervision, it may be offered and rejected. It is not only a burden on those who supervise but it imparts a burden on the supervised to respond promptly and as completely as possible. The events and activities will need to be documented. In fact, a decision on appeal may depend as much on the thoroughness of the documentation as on the frequency of the observations or the quality of the supervision. The best of intentions will not be acceptable in place of proof. Even gratuitous and undeserved compliments designed to encourage may become problems in the event of litigation.

process, substantive and procedural, will be required, for the expectancy of continued employment amounts to a property interest. Nonrenewal under these circumstances is a deprivation of property; a right which is not absolute, but one which may only be abridged according to due process and in complete compliance with statutes, existing contracts, policies and practices. (See state board regulations on hearings, Appendix A).

5. The school board's decision must be based on the evidence presented at the hearing. Fact finding is required, and the decision must be provided in writing within fifteen days of the close of the hearing. Sometimes a transcript of the hearing would be warranted, and it is strongly recommended that legal counsel be available to the board and the administration. The advice of counsel is needed early in a complicated nonrenewal matter. Such advice is especially needed when the statement of reasons is being prepared and when the hearing is being planned. One can almost promise that the hasty action of administrators or board members will result in prolonged and unpleasant controversy. On the other hand, those who accept responsibilities for the quality of education must also be prepared to take lawful action to ensure the competency of the instructional staff. By careful selection procedures and through effective supervision and administration the employment of incompetents may lawfully be avoided or terminated. It takes courage, and one must expect at times to be second-guessed when it comes to the exercise of judgment. Hopefully, the judgment will have a sound basis in fact and the second-guessers will not prevail because of procedural errors which should have been avoided.

Review of Nonrenewal Decisions By State Board

According to New Hampshire Revised Statutes Annotated:

"189:14-b Review by State Board. A teacher aggrieved by such decision may request the state board of education for review thereof. Such request must be in writing and filed with the state board within ten days after the issuance of the decision to be reviewed. Upon receipt of such request, the state board shall notify the school board of the request for review, and shall forthwith proceed to a consideration of the matter. Such consideration shall include a hearing if either party shall request it. The state board shall issue its decision within fifteen days after the request for review is filed, and the decision of the state board shall be final and binding upon both parties."

The language of RSA 189:14-b seems clearly stated but there has been considerable argument over the type of hearing to be conducted by the state board. The argument centers on whether or not the hearing would be "de novo". In a de novo hearing, the judgment of the local school board would be

suspended and the state board would determine the case as if it had originated with the state board. The latin term "de novo" means "new" and the evidence would have to be presented as if there had been no local level hearing. In fact, in a de novo hearing the state board would not be required to give any attention to the decision reached by the local board.

Of course this argument relates to local v. state control and it had to be decided. The key question was should the local decision prevail unless there had been a denial of due process or some other procedural error. In other words should the state board's judgment replace that of the local board when there had been **no** unlawful action by the local board? The decision exists in the form of State Board Regulations and it does not provide for a de novo hearing. Instead, the state board reviews the local decision, does not accept new evidence, accepts the findings of fact made by the local board and reviews the matter with a view to overturn the local decision only when there has been an abuse of discretion or errors of procedure.

The state board regulations govern hearings both at the local and state level. School officials certainly must know and follow these regulations very carefully in all instances of employment termination.

Enforcement of Employment Contracts

This treatise is for the most part concerned with the lawful termination of employment. However, there is the reverse situation where the employer seeks to require personal performances of an employee according to an existing contract.

The thirteenth Amendment prohibits the use of force to require a person to labor against his will.

United States Constitution

"Article XIII

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States or any place subject to their jurisdiction."

The prohibition applies regardless of whether the person is paid or not and is a bar against forced performance of an employment contract. Even though the employee cannot be required to provide services, the employer has a court-enforceable remedy. If the employee willfully breaches the contract, the employer can recover whatever it costs to replace the employee (cost to engage another employee minus what would have been paid had the contract not been breached). If the employee's breach was not intentional, his duty to perform will be excused. Illness and death would of course excuse the duty. Willful does not in civil proceedings denote bad purpose; it only denotes knowing or voluntary as distinguished from accidental.

Cases and Case Briefs

Cases and briefs have been selected to extend the reader's opportunity to understand the law with respect to the termination of teacher employment. The cases included are presented in the order of their case number.

1. Board of Regents of State Colleges et al. v. Roth (case) 408 US 564
2. Perry et. al. v. Sindermann (brief) 408 US 593
3. Spencer v. Laconia School District (case) 218 A2d 437
4. Drown v. Portsmouth School District (case) 435 F2d 1182
5. Stoneman v. Tamworth School District (brief) 302 A2d 657
6. Hawthorne v. Dresden School District (case) 324 A2d 728
7. Farrelly v. Timberlane Regional School District (case) 324 A2d 723
8. Chase v. Fall Mountain Regional School District 330 FSupp 388

Other cases which can be instructive are suggested as supplementary readings.

Beattie v. Roberts; 436 F2d 747, 330 F.S. 1250 and 341 F.S. 832

McDonough v. Kelly; 329 FSupp 744

Goldberg v. Kelly; 397 US 254

Plymouth School District v. State Board of Education; 112 NH 74

Appendix

In addition to the cases, the following documents have been provided:

Appendix A "State Board Policy for Administrative Hearing Procedures Under New Hampshire RSA 189". Procedures to be followed when hearings are required.

Appendix B "Rules and Procedures Governing a Dismissal Hearing". These guidelines, prepared by Attorney Bradley Kidder of the law firm of Nighswander, Lord, Martin, and Killkelley, are provided for the information of those who will be planning dismissal hearings.

Appendix C "Record of Hearing and Decision of Local Board". This document is based on an actual record, but fictitious names have been used and the circumstances have been changed to avoid possible embarrassment to participants.

CASES

Reference Materials

Reference is made throughout this treatise to the New Hampshire Revised Statutes Annotated, published by the Equity Publishing Corporation, Orford, New Hampshire (1970 Replacement Edition).

The eight cases and briefs provided in the next section have been obtained either from the court which issued the decision (as in Board of Regents of State Colleges et al. v. Roth: Supreme Court of the United States) or from the attorney who prepared the brief (i.e. Atty. Bradley Kidder's brief re Richard L. Stoneman v. Tamworth School District et al.).

The materials in the Appendix were provided respectively by the New Hampshire State Board of Education and Attorney Bradley Kidder.

.....

No summary is attempted. The "law" is a process. The "body of law" will continue to grow. To know the law one must keep informed with respect to recent cases. School officials – board members and administrators – as public trustees need not practice law, but they do need, according to **Wood v. Strickland,**[*] to know the basic unquestioned constitutional rights. A violation of rights cannot (again from **Wood v. Strickland**) be justified by ignorance or disregard of settled law.

[*] **Wood v. Strickland.** Supreme Court of the U.S., 1975, –U.S.–, 95 S.Ct. 992.

Case Number 1

Reprinted by NOLPE

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOARD OF REGENTS OF STATE COLLEGES et al. *v.* ROTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-162. Argued January 18, 1972—Decided June 29, 1972

Respondent, hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave a nontenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal," but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for re-employment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. *Held:* The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, are not tantamount to a deprivation of "liberty," and the terms of respondent's employment accorded him no "property" interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 5-14.

446 F. 2d 806, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C.J., filed a concurring opinion, see No. 70-36, *Perry* v. *Sindermann*. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, see No. 70-36, *Perry* v. *Sindermann*. MARSHALL, J., filed a dissenting opinion. POWELL, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al.,
Petitioners, *v.* David F. Roth, Etc.
On Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit.

[June 29, 1972]

Mr. Justice Stewart delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969.[1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a "permanent" employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment "during efficiency and good behavior." A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing beyond his one-year appointment.[2] There are no statutory or administrative standards defining

---

[1] The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract. The notice of his appointment provided that: "*David F. Roth* is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) *Oshkosh* as (Rank:) *Assistant Professor* of (Department:) *Political Science* this (Date:) *first* day of (Month:) *September* (Year:) *1968*." The notice went on to specify that the respondent's "appointment basis" was for the "academic year." And it provided that "[r]egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made." See n. 2, *infra*.

[2] Wisconsin Statutes 1967, c. 37.31 (1), in force at the time, provided in pertinent part that: "All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior, after 4 years of continuous service in the state university system as a teacher."

eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of University officials.

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges" and pursuant to certain procedures.[1] A nontenured teacher, similarly, is protected to some extent *during* his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher "dismissed" before the end of the year may have some opportunity for review of the "dismissal." But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February first "concerning retention or non-retention for the ensuing year." But "no reason for non-retention need be given. No review or appeal is provided in such case."[2]

In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969-1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

---

[1] Wisconsin Statutes 1967, c. 37.31, in force at the time, provided in pertinent part that: "No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision."

[2] The Rules, promulgated by the Board of Regents in 1967, provide:

"RULE I—February 1st is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date."

"RULE II—During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case."

"RULE III—'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenured faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only."

"RULE IV—When a non-tenured faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case."

The respondent then brought this action in a federal district court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.[1] Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.[2]

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F. Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F. 2d 806. We granted certiorari. 404 U.S. 909. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[3] We hold that he did not.

[1] While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the nonretention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. "In the present case," it stated, "it appears that a determination as to the actual bases of [the] decision must await amplification of the facts at trial . . . Summary judgment is inappropriate." 310 F. Supp., at 982.

[2] The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. *E. g., Orr* v. *Trinter*, 444 F. 2d 128 (CA6); *Jones* v. *Hopper*, 410 F. 2d 1323 (CA10); *Freeman* v. *Gould Special School District*, 405 F. 2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. *Drown* v. *Portsmouth School District*, 435 F. 2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an "expectancy" of continued employment. *Ferguson* v. *Thomas*, 430 F. 2d 852, 856 (CA5).

I

The requirements of procedural due process apply only to the deprivation of interest encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated the right to some kind of prior hearing is paramount.[1] But the range of interests protected by procedural due process is not infinite.

The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at the Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F. Supp., at 977-979. Undeniably, the respondent's re-employment prospects were of major concern to him—concern that we surely cannot say was insignifcant. And a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process.[2] But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at state. See *Morrissey* v. *Brewer*, — U.S.—, —. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

"Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting). For that reason the Court has fully

---

[1] Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U.S. 371, 379. "While '[m]any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." *Bell* v. *Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, *e.g.*, *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566; *Phillips* v. *Commissioner*, 283 U.S. 589, 597; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594.

[2] "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 263; *Hannah* v. *Larche*, 363 U.S. 420. The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course does not depend upon such a narrow balancing process. See n. 7, *supra*.

and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.[8] The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.[9] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[10]

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

---

[8] In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd by an equally divided Court, 341 U.S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson*, 403 U.S. 365, 374. See, *e.g.*, *Morrissey* v. *Brewer*, — U.S. —, —; *Bell* v. *Burson*, 402 U.S. 535, 539; *Goldberg* v. *Kelly*, 397 U.S. 254, 262; *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6; *Pickering* v. *Board of Education*, 391 U.S. 563, 568; *Sherbert* v. *Verner*, 374 U.S. 398, 404.

[9] See, *e.g.*, *Connel* v. *Higgenbotham*, 403 U.S. 207, 208; *Bell* v. *Burson*, 402 U.S. 535; *Goldberg* v. *Kelly*, 397 U.S. 254.

[10] "Although the Court has not assumed to define 'liberty' [in the Fifth Amendment's Due Process Clause] with any great precision, that term is not confined to mere freedom from bodily restraint." *Bolling* v. *Sharpe*, 347 U.S. 497, 499. See, *e.g.*, *Stanley* v. *Illinois*, — U.S. —.

II

"While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500; *Stanley* v. *Illinois*, — U.S. —.

There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437. *Wieman* v. *Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *United States* v. *Lovett*, 328 U.S. 303, 316-317; *Peters* v. *Hobby*, 349 U.S. 331, 352 (concurring opinion). See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials.[*] In the present case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not involve any regulations to bar the resondent from all other public employment in State universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, at 185 (Jackson, J., concurring). See *Truax* v. *Raich*, 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose

[*] The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

a range of opportunities "in a manner . . . that contravene[s] due process," *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character*, 373 U.S. 96, 103. See *Cafeteria Workers* v. *McElroy*, *supra*, at 898. In the present case, however, this principle does not come into play.[3]

To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.[4]

---

[3] The District Court made an *assumption* "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guaranties. 446 F. 2d, at 809. But even assuming *arguendo* that such a "substantial adverse effect" under these circumstances would constitute a state imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how non-retention might affect the respondent's future employment prospects. Mere proof, for example, that his record of non-retention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v. *Board of Bar Examiners*, *supra*.

[4] See n. 5, *infra*. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." 446 F. 2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's non-retention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made "with a background of controversy and unwelcome expressions of opinion." *Ibid.*

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. *Carroll* v. *Princess Anne*, 393 U.S. 175. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines and so forth. *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Marcus* v. *Search Warrant*, 367 U.S. 717. See *Freedman* v. *Maryland*, 380 U.S. 51; *Bantam Books* v. *Sullivan*, 372 U.S. 58. See generally Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest.

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one University. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers* v. *McElroy*, *supra*, at 895-896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U.S. 254.[11] See *Fleming* v. *Nestor*, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower* v. *Board of Education*, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman* v. *Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without a hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell* v. *Higgenbotham*, 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or un-

---

[11] *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the States, and the District of Columbia, as well as certified public accountants duly qualified under the law of any State or the District, are made eligible . . . The rules further provided that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." *Id.*, at 119. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.*, at 123.

derstandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at the Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[6] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

---

[6] To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by the Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment, see *Perry* v. *Sindermann*, *post*, at —, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for non-retention would, or would not, be appropriate or wise in public colleges and universities.[11] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the decision of this case.

[11] See, *e. g.*, Report of Committee A on Academic Freedom and Tenure, "Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments," 56 AAUP Bulletin 21 (Spring 1970).

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al.,
Petitioners, *v.* David F. Roth, etc.
On Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit.

[June 29, 1972]

Mr. Justice Douglas, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University—Oshkosh—where from 1968-1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 Black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the Black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in *Sindermann*, an action was started in a Federal District Court under 42 U.S.C. § 1983[1] claiming in part that the decisions of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F. Supp. 972, 983. The Court of Appeals affirmed. 446 F. 2d 806.

Professor Will Herberg of Drew University in writing of "academic freedom" recently said:

> "... it is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment. But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional." Washington Evening Star, Jan. 23, 1972.

---

[1] Section 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects "liberty" and "property" as stated by the Court in *Sindermann*.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools also, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurter stated the constitutional theory in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-262 (concurring opinion):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

We repeated that warning in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor

Relations Act, 29 U.S.C. § 151 *et seq.* While discharges of employees for "cause" are permissible (*Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 217), discharges because of an employee's union activities is banned by § 8(a) (3), 29 U.S.C. § 158 (c) (3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See *J.P. Stevens & Co.* v. *Labor Board*, 380 F. 2d 292, 300.

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the *Sweezy* case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the *Keyishian* case, one of the petitioners (Keyishian himself) had only a "one-year-term contract" that was not renewed. 385 U.S., at 592. In *Shelton* v. *Tucker*, 364 U.S. 479, one of the petitioners was a teacher whose "contract for the ensuing school year was not renewed" (*id.*, at 483) and two others who refused to comply were advised that it made "impossible their re-employment as teachers for the following school year." *Id.*, at 484. The oath required in *Keyishian* and the affidavit listing memberships required in *Shelton* were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school system, as we noted in *Pickering* v. *Board of Education*, 391 U.S. 563, 569. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 374. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968). In *Hannegan* v. *Esquire*, 327 U.S. 146, 156, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 402, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In *Wieman* v. *Updegraff*, 344 U.S. 183, we held that an applicant could not be denied the opportunity for public employment because he had exercised his First Amendment rights. And in *Speiser* v. *Randall*, 357 U.S. 513, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgement of Fourteenth Amendment rights.

As we held in *Speiser* v. *Randall*, *supra*, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "The protection of the individual against arbitrary action . . . [is] the very essence of due process," *Slochower* v. *Board of Higher Education*, 350

U.S. 551, 559 (1956), but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such "arbitrary action."

Moreover, where "important interests" of the citizen are implicated (*Bell* v. *Burson*, 402 U.S. 535, 539) they are not to be denied or taken away without Due Process. *Id.*, at 539. *Bell* v. *Burson* involved a driver's license. But also included are disqualification for unemployment compensation (*Sherbert* v. *Verner*, 374 U.S. 398), discharge from public employment (*Slochower* v. *Board of Education*, *supra*), denial of tax exemption (*Speiser* v. *Randall*, *supra*), or withdrawal of welfare benefits. *Goldberg* v. *Kelly*, 397 U.S. 254. And see *Wisconsin* v. *Constantineau*, 400 U.S. 433. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria Workers v. *McElroy*, 367 U.S. 886, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher at least in his State.

If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights (a) because his employment was conditioned on a surrender of First Amendment rights and (b) because he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons—both of which were refused by petitioners—there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F. Supp. 972, 979-980:

> "Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inap-

> propriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact."

It was that procedure that the Court of Appeals approved. 446 F. 2d 806, 809-810. The Court of Appeals also concluded that though the § 1983 action was pending in court, the court should stay its hand until the academic procedures had been completed.[2] As stated by the Court of Appeals in *Sindermann*:

> "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination." 430 F. 2d, at 944-945.

That is a permissible course for District Courts to take, though it does not relieve them of the final determination whether nonrenewal of the teacher's contract was in retaliation of the exercise of First Amendment rights.

Accordingly I would affirm the judgment of the Court of Appeals.

---

[2] Such a procedure would not be contrary to the well-settled rule that § 1983 actions do not require exhaustion of other remedies. See, *e.g.*, *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Monroe* v. *Pape*, 365 U.S. 167 (1961). One of the allegations in the complaint was that respondent was denied any effective state remedy and the District Court's staying its hand thus furthered than thwarted the purposes of § 1983.

SUPREME COURT OF THE UNITED STATES

No. 71-162

The Board of Regents of State Colleges et al.,
Petitioners, v. David F. Roth, Etc.

On Writ of Certiorari to the
United States Court of Appeals for
the Seventh Circuit.

[June 29, 1972]

Mr. Justice Marshall, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968-1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[1] This claim was sustained by the District Court which granted respondent summary judgment, 310 F. Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court, 446 F. 2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property interest, I would go further than the Court does in defining the terms "liberty" and "property."

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling—*i.e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory[2] or contractual[3] controls, a government employer is different. The government may only act fairly and reasonably.

---

[1] Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us at the present time.

[2] See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e.

[3] Cf. Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L.J. 1302 (1948).

This Court has long maintained that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (Hughes, J.). See also *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be "discharged at any time for any reason or for no reason." *Truax* v. *Reich*, 239 U.S., at 38.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, *e.g.*, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); *United States* v. *Lovett*, 328 U.S. 303, 316-317 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Mr. Justice Douglas has written that:

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S., at 179.

And Mr. Justice Frankfurter has said that "[t]he history of American freedom is, in so small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945). With respect to occupations controlled by the government one lower court has said that "[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby* v. *Allen*, 326 F. 2d 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 262 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons and a chance for a hearing on disputed issues of fact;[4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing;[5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing;[6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute.[7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. *Goldberg* v. *Kelly*, *supra*. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results not from malice, but from innocent error. "Experience teaches . . .

---

[4] *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926).
[5] *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956).
[6] *Willner* v. *Committee on Character*, 373 U.S. 96 (1963).
[7] *Connell* v. *Higginbotham*, 403 U.S. 207 (1972).

that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself operates to prevent erroneous decisions on the merits from occurring." *Silver* v. *New York Stock Exchange*, 377 U.S. 341, 366 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

> "In my judgment, there is no basis division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice JACKSON in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best assurance for the Government itself against those blunders which leave lasting strains on a system of justice'—blunders which are likely to occur when reasons need not be given and when the reasonableness and indeed legality of judgments need not be subjected to any appraisal than one's own . . ." Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of L. 70-73 (1961).

Accordingly, I dissent.

Case Number 2

Brief prepared by Bradley Kidder, Esquire and included with his kind permisston. JEB.

UNITED STATES SUPREME COURT

Perry et al

vs.

Sindermann

408 U. S. 593 33 L. Ed 2nd 570

FACTS:

1. Sindermann was a teacher in the state college system of the State of Texas for 10 years, the last four as a junior college professor under a series of one-year written contracts.

2. During the 1968-1969 academic year, a controversy arose between the respondent and the college administration after Sindermann was elected President of the Texas Junior College Teachers Association.

3. In May, 1969, the respondent's one-year employment contract terminated, and the Board of Regents voted not to offer him a new contract for the next academic year, without giving him an explanation or prior hearing.

4. The Regents did issue a press release setting forth allegations of Sindermann's insubordination.

ISSUE:

WHETHER SINDERMANN'S LACK OF CONTRACTUAL OR TENURE RIGHT TO REEMPLOYMENT, TAKEN ALONE, DEFEATS HIS CLAIM THAT THE NON-RENEWAL OF HIS CONTRACT VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS.

RULING:

No.

RATIONALE:

1. Even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for a number of reasons, there are **some** reasons upon which the government may not act, if it infringes upon his constitutionally protected interests, especially his interest in free speech.

2. The non-renewal of a non-tenured public school teacher's one-year contract may not be predicated upon his exercise of First and Fourteenth Amendment rights.

3. This Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may therefore be an impermissible basis for the termination of his employment.

4. Sindermann alleges that the college has a **de facto** tenure program, that he had tenure under that program.

5. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

6. A teacher who has held his position for a number of years might be able to show from the circumstances of his service and from other relevant facts that he has a legitimate claim of entitlement to job tenure.

7. We agree that Sindermann must be given an opportunity to prove the legitimacy of his claim in the Federal district court, since proof of such a property interest obligates the college officials to grant a hearing at his request, where he could be informed of the grounds of his non-retention and challenge their sufficiency.

Case Number 3

Belknap,
No. 5432.

G. Alda Spencer v. Laconia School District

Argued January 4, 1966.
Decided March 30, 1966.

1. The statute (RSA 189:13) providing that school boards may dismiss any teacher found by them to be immoral or incompetent or who fails to conform to prescribed regulations limits the authority of school boards to dismiss teachers to the grounds specified, and hence the dismissal of a teacher solely for economy reasons was a violation of the statute.
2. In such case, the statute (RSA 189:14) imposing liability upon the district "to the extent of the full salary" for the contract period was held to fix the outside limit of recovery, and any earnings by the dismissed teacher after dismissal should be deducted from her full salary for the contract period.
3. A renomination provision in a school teacher's contract providing that the contract might be cancelled by either party as of June 30 of any year by giving notice by April 15 of such year was held invalid because in conflict with the statute (RSA 189:14-a, 14-b) providing for notice by March 15 if the teacher is not to be renominated, and a right to hearing before the school board, subject to review by the State Board.

Assumpsit to recover unpaid salary for the school years 1963-1964 and 1964-1965 under a contract of employment by which the defendant agreed to employ the plaintiff as a teacher for a period of three years, commencing September 15, 1962. The plaintiff was dismissed on August 7, 1963 "for budgetary reasons," and thereafter found employment elsewhere.

In advance of trial, and upon an agreed statement of facts, the Superior Court (*Griffith, J.*) transferred certain questions of law without ruling.

Upton, Sanders & Upton (*Mr. Frederic K. Upton* orally), for the plaintiff.

Willard Martin, city solicitor (by brief and orally), for the defendant.

Duncan, J. By contract dated April 13, 1962, the parties agreed upon the plaintiff's employment as a teacher for a period of three years, commencing September 15, 1962. She was assigned to work in the kindergarten department at an agreed salary of $5,250 for the first year. The contract provided that salaries for the ensuing years should be those called for by the "Laconia Teachers' Salary Schedule and Scale for the Teacher."

The contract further provided by paragraph 3(c) that the district might terminate the contract in accordance with RSA 189:13, 31 and 32, "subject to appeal, if the Teacher is removed by the Superintendent," and by paragraph 3(e) that the contract could be cancelled "as of June 30 of any year by either party if notice in writing is given not later than April 15 of such year."

On April 15, 1963 the plaintiff was notified that her salary for the year

1963-1964, under the continuing contract, would be $5,400. On August 6, 1963 the board of education of the district voted to discontinue kindergartens for the next school year because of a projected reduction in the city appropriation for the schools for that year. On August 7, 1963, the plaintiff was notified that her position had been abolished for lack of funds. She was later advised that no teaching work of any kind would be available to her for the coming year.

The parties agree that this conduct of the school board constituted "a dismissal of the plaintiff or a termination of her employment without her consent." Thereafter she obtained employment in Massachusetts. Subsequently arrangements were made by the district which permitted restoration of kindergarten classes on a limited basis, staffed by three full-time and one part-time kindergarten teachers.

RSA 189:13 and 14, first enacted in 1905 (Laws 1905, 59:1) provide as follows:

"189:13 Dismissal of Teacher. The school board may dismiss any teacher found by them to be immoral or incompetent, or one who shall not conform to regulations prescribed; provided, that no teacher shall be so dismissed before the expiration of the period for which said teacher was engaged without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing.

"189:14 Liability of District. The district shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of the preceding section, to the extent of the full salary for the period for which such teacher was engaged."

The first two questions transferred by the Trial Court relate to these provisions, and are as follows:

"1. Was the dismissal of the Plaintiff under the circumstances set forth in the Agreed Statement of Facts a violation of RSA 189:13?

"2. If question 1 is answered in the affirmative, is the Defendant entitled to have deducted from the damages prescribed by 189:14 the compensation the Plaintiff earned at other employment during the contract period?"

The plaintiff maintains that the provisions of section 13, *supra*, preclude all other grounds for dismissal by a school board, so that the district thereby became liable under section 14. The district maintains that the application of sections 13 and 14 is limited to dismissal for causes personal to the teacher, and that they have no application when, as in this case, dismissal is for reasons of economy. While this view finds support in cases such as *Funston* v. *District School Board*, 130 Ore. 82, where the Oregon statutes were construed, we are of the opinion that in the light of the history of our own legislation, the view advanced by the plaintiff should be adopted here.

Prior to 1885 (Laws 1885, *c.* 43) the authority to hire teachers was vested in the prudential committees of school districts. R.S. (1842) *c.* 70, *s.* 10; G.L. (1878) *c.* 87, *ss.* 14, 19. At the same time, the superintending school committees of towns were given certain powers of dismissal, not unlike those now conferred by RSA 189:13. R.S. (1842) *c.* 73, *s.* 3; G.L. (1878) *c.* 89, *ss.* 7-9. Thus, throughout this period, the town committees were required to dismiss teachers

who were "unfit to teach." R.S. (1842) *c.* 73, *s.* 3, *supra*; Laws 1858, *c.* 2088, *s.* 3; G.S. (1867) *c.* 81, *ss.* 7-9; G.L. (1878), *c.* 89, *ss.* 7-9. Originally the committee could act only upon petition of a majority of the voters of the district, and after notice to the teacher and hearing. Laws 1845, *c.* 225, *s.* 1. In addition to the requirement that it should dismiss "unfit" teachers, it was authorized to dismiss if "in their judgment [dismissal] will best promote the interests of the district." *Id.*

From 1858 to 1867 the causes for which a superintending school committee might dismiss also included "other just cause." Laws 1858, *c.* 2088, *supra*. *Cf.* G.S. (1867) *c.* 81, *ss.* 7-9 *supra*. From 1858 to 1895, another ground for dismissal was that the teacher's services "were deemed unprofitable to any school." Laws 1858, *c.* 2088, *supra*. *Cf.* Laws 1895, *c.* 51.

The statutes consistently provided that a teacher dismissed because unfit to teach "shall be entitled to compensation until such dismission, but no longer." Laws 1845, *c.* 225, *s.* 1, *supra*.

It is a fair inference that the powers granted to town committees to dismiss teachers hired by district committees were intended to be restricted to those from time to time specified by the statutes.

In 1885, the functions of the school committees of towns and of the prudential committees of districts were united in the "school board" of the district. Laws 1885, *c.* 43, *supra*. See *Wilcox* v. *Burnham*, 98 N.H. 64, 66; *Horne* v. *School District*, 75 N.H. 411. Thus the authority of a school board to dismiss a teacher continued to be limited to the grounds previously enumerated by prior statutes, although the requirements of a petition by the voters and notice and hearing were abandoned, as were the criteria of "other just cause" and the "best interests of the district." See P.S. (1901) *c.* 92, *ss.* 3, 4.

In this state of the law, the Superintendent of Public Instruction was moved to point out that teachers were subject to dismissal without notice or hearing, whenever a school board found them to be "unsuitable or incompetent"; and to urge that the laws "be amended so that the teachers' term of office [will] be more secure." 53d N.H. School Report (1903-4) 288. See also, 54th N.H. School Report 186-188, 194 (1905-6).

In 1905 the provisions now appearing in RSA 189:13, 14 took their present form. Laws 1905, *c.* 59, *s.* 1. They have remained unchanged although since 1919 superintendents have had general authority to remove a teacher "for cause" subject to appeal to the Commissioner of Education (RSA 189:31, 32; Laws 1919, *c.* 106, *s.* 12), and have been charged with the responsibility of nominating "all teachers" elected by school boards. RSA 189:39; Laws 1919, *c.* 106, *s.* 12, *supra*.

In the light of this history, and the interpretation of the somewhat parallel provision relating to the dismissal of pupils (RSA 193:13; *Sweeney* v. *Young*, 82 N.H. 159, 162) we conclude that it was the legislative purpose in enacting what is now RSA 189:13, 14, to limit the authority of school boards with respect to the dismissal of teachers to the grounds specified by RSA 189:13. *Horne* v. *School District*, 75 N.H. 411, *supra*. See, Edwards, The Courts and the Public Schools (Rev. *ed.*) *pp.* 478, 481 (1955); Annot. 63 A.L.R. 1416. The first ques-

tion transferred is answered in the affirmative. The plaintiff's dismissal was a violation of RSA 189:13, not for want of a hearing, but because she was dismissed for a cause not specified by the statute. *Sweeney* v. *Young, supra; Sarle* v. *School District*, 32 Ariz. 96. See *People* v. *Maxwell*, 177 N.Y. 494.

It follows that the district is liable under RSA 189:14 "to the extent of the full salary for the period for which [she] was engaged." *Horne* v. *School District, supra.* So far as we are aware, this provision has not been interpreted by any reported decision. Presumably it was occasioned, in part at least, by the fact that "the school board are trustees – not agents – of the district." *Id.*, 412. In our opinion the words "to the extent of" were intended to fix the "full salary" as the outside limit of recovery, rather than to require that it measure the damages without regard to aggravation or mitigation thereof. See *O'Dwyer* v. *Grove Service Corp.* (Sup. Ct.) 181 N.Y.S. 2d 338, 339; *Cf. Morrissey* v. *Holland*, 79 N.J. Super. 279 where the statute provided for recovery of "the salary . . . for the period covered by the illegal dismissal." We hold in answer to the second question transferred that the defendant is entitled to have the plaintiff's earnings after her dismissal deducted from her full salary for the contract period. 47 Am. Jur. 402, "Schools," *s.* 145; 78 C.J.S. 1123-25, "Schools & School Districts," *s.* 216.

The third question transferred is as follows: "Are the provisions of paragraph 3(e) of the teacher's contract of April 13, 1962 . . . invalid because in conflict with RSA 189:14-a and 14-b"? The contract provision referred to was as follows: "(e) That this contract may be cancelled as of June 30 of any year by either party if notice in writing is given not later than April 15 of such year."

RSA 189:14-a provides as follows: "**Failure to be renominated or reelected.** Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before March 15 if he is not to be renominated or reelected. Any such teacher who has taught for three or more years in the same school district and who has been so notified may request in writing within five days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected. The school board, upon receipt of said request, shall provide for a hearing on the request to be held within fifteen days. The school board shall issue its decision in writing within fifteen days of the close of the hearing." RSA 189:14-b provides for a review of such a decision by the State Board of Education, whose decision shall be "final and binding upon both parties." Laws 1957, *c.* 285, *s.* 1.

These provisions resulted from a bill which was amended in both House and Senate before passage, and was described in the Senate as a "rewritten bill . . . not so far reaching as the original bill to which there was great opposition by school board members and citizens." As then described, the "new version" attempted to "give a certified teacher whose contract is not to be renewed . . . a fair hearing. We believe that this is a fair arrangement for protecting the teacher and for avoiding infringement of the rights of the school board." Jour-

nal of the Senate (1957) 688, 689. The bill was thereafter further amended to provide for review by the State Board. *Id.*, 1055.

We think that the inconsistencies between the contract provision and the statute are more fundamental than the mere discrepancy in the date of the required notice. The 1957 legislation was designed in part to afford greater security to the teacher. By enacting it, the Legislature doubtless gave consideration to the relative bargaining positions of the parties (see *Manchester* v. *Guild*, 100 N.H. 507 (March 26, 1957)) and plainly concluded that the issue of renomination should not be left solely to the decision of the local authorities. *S.* 14-b, *supra*. The provision of paragraph 3(e) of the contract would in effect permit the defendant to nullify the 1957 statute and cannot be held valid. *Sarle* v. *School District*, 32 Ariz. 96, *supra;* Edwards, The Courts and the Public Schools, *supra*, 478-480. Consequently the third question transferred is answered in the affirmative.

Remanded.

All concurred.

Case Number 4

United States Court of Appeals
For the First Circuit

No. 7667.

PATRICA DROWN,
PLAINTIFF, APPELLANT,

v.

PORTSMOUTH SCHOOL DISTRICT, et al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before Aldrich, *Chief Judge*,
McEntee and Coffin, *Circuit Judges*.

Jack B. Middleton, with whom *Peter B. Rotch* and *McLane, Carleton, Graf, Greene & Brown* were on brief, for appellant.

John C. Driscoll for appellees.

Bradley F. Kidder and *Nighswander, Lord, Martin & KillKelley* on brief for The New Hampshire School Boards Association, amicus curiae.

David Rubin, Richard J. Medalie, Alvin Friedman, and *Epstein, Friedman and Duncan* on brief for The National Education Association, amicus curiae.

December 18, 1970.

Coffin, *Circuit Judge* Appellant, a public school teacher, brings this action pursuant to 42 U.S.C. § 1983 against the Portsmouth School District, the administrator, and the school board members of the district. She claims that appellee's failure to offer her a teaching contract for the 1970-71 school year deprived her of rights guaranteed to her by the Constitution.

Appellant was employed as a non-tenured teacher for the 1968-69 and 1969-70 school years. For each year, she was employed under a standard one-year contract. Under New Hampshire law and pursuant to appellant's one-year contract, a non-tenured teacher may not be dismissed without cause and without being afforded certain procedural rights *during* the school year, and tenured teachers are entitled to similar safeguards if they are not rehired. N.H. Rev. Stat. Ann. ch. 189, § 13. But a failure to rehire a non-tenure teacher affords the teacher no rights other than to notification by March 15 of the school year. N.H. Rev. Stat. Ann. ch. 189, § 14-a.

Appellant was given timely notice that she would not be rehired for the 1970-71 school year. She sought and was denied a list of reasons for this decision and a hearing so that she might have an opportunity to challenge it. Her complaint, which was dismissed below as failing to state a cause of action, claims that she was not afforded due process by the school district. She argues

that she was denied certain rights, principally that of a hearing when the school district decided not to rehire her.[1]

Appellant's contract with appellees implies that the school district has virtually unlimited discretion to rehire her or not. *See* Note, *Developments in the Law — Academic Freedom*, 81 Harv. L. Rev. 1045, 1099-1100 (1968). Nevertheless, there is no doubt that appellant has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons. *Slochower* v. *Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir., *en banc*, 1966), *cert. denied*, 385 U.S. 1003 (1967); *Albaum* v. *Carey*, 283 F. Supp. 3 (E.D. N.Y. 1968) *See generally*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-58 (1968); Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 233-43 (1956). But appellant makes no claim of any violation of her collateral constitutional rights; she merely says that the process by which the decision not to rehire her was made does not comport with the fundamental fairness guaranteed her by the Fourteenth Amendment.

Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or the exercise of First Amendment rights. *Freeman* v. *Gould Special School District of Lincoln County, Arkansas*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969).[2] Others have held that a non-tenured teacher is entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Orr* v. *Trinter*, — F. Supp. — (S.D. Ohio, Aug. 3, 1970); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970); *Gouge* v. *Joint School District No. 1*, 310 F. Supp. 984 (W.D. Wisc. 1970). Still others have taken a middle course, requiring administrative hearings only when there is an allegation that

---

[1] Along with the right to a hearing, appellant and the National Educational Association as Amicus Curiae, ask this court to detail other safeguards to which appellant is entitled, including (1) the right to cross-examine witnesses; (2) the right to present both oral and written arguments; (3) the right to retain counsel; (4) the right to a determination based solely on legal rules and the evidence adduced at the hearing; (5) the right to statement by the decision-maker of his reasons and of the evidence relied on; (6) the right to an impartial decision-maker other than the school board; (7) the right to a hearing on the record so that a verbatim transcript can be made; and (8) the right to be advised of these rights. Presumably, they would also include the right to judicial review.

[2] For a critical analysis of this opinion, see Note, 44 N.Y.U. L. Rev. 836 (1969).

a constitutionally impermissible reason motivated the decision not to rehire. *Ferguson* v. *Thomas*, 430 F.2d 852 (5th Cir., 1970); *Sindermann* v. *Perry*, – F.2d – (5th Cir., Aug. 10, 1970).[3] We are faced with this precise question for the first time.[4]

To determine what, if any, procedures are required when a school board decides not to rehire a non-tenured teacher, we are required to balance the competing interests of the individual teacher and of the school board. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961); *cf. Goldberg* v. *Kelly*, 397 U.S. 254 (1970); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, – Duke L.J. – (1970) (draft of article submitted by counsel). The school board is interested primarily in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if the teacher merits tenure. Such evaluations require judgments about many subjective factors which are difficult to document with precision, such as the ability of the teacher to inspire students, his mastery of and progress in his subject, and his capacity to work effectively with colleagues, supervisors, and parents.

The teacher, particularly one at the outset of his career, is in the position of having invested in preparation for a career which depends mainly on the willingness of public bodies to employ him. Such willingness, as the complaint alleges, is seriously dissipated if not destroyed when an early employer refuses to rehire the teacher. In the present case the plaintiff, after four years of apparently satisfactory performance in Illinois and New Hampshire, confronts a decision not to rehire her without any reason given. This effectively forecloses her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.

Against this background of competing interests, we assess the benefits and burdens of the rights claimed by appellant. We first examine the effect on both the teacher and the school authorities of a right to receive a detailed statement of reasons for non-retention, accompanied by access to any teaching evalua-

---

[3] The Fifth Circuit distinguishes between non-tenured teachers who have an expectancy of reemployment and those who do not. Those with an expectancy of reemployment are entitled to the full procedural rights of a teacher with tenure. We are not impressed by this distinction. Almost every teacher, arguably at least, has such an expectancy, and we think a teacher has an interest in employment protected by the due process clause independent of the existence of this quasi-contractual right. *Cf. Birnbaum* v. *Trussell*, 371 F.2d 672 (2d Cir. 1966).

[4] We have, however, decided an analogous case. In *Medoff* v. *Freeman*, 362 F.2d 472 (1st Cir. 1966), we held no hearing was required to guarantee due process to a dismissed probationary government employee who had been informed of the reasons for his dismissal.

tion reports.[5] From the point of view of the teacher, such notice would give him the opportunity informally to correct a decision made on the basis of mistaken or false facts. Moreover, he might find that he had evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Even if the reasons assigned were false ones, demonstrating their falsity would have probative value in a claim that the real reasons lie elsewhere. Additionally the teacher would have the extra benefit of knowing where his performance failed to live up to expectations – a benefit that may not be constitutionally required but which is surely desirable. Finally, if the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

From the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers. The workability of such a requirement is evident from the fact that several states presently require their school boards to do so. *E.g.*, Wash. Rev. Code Ann. § 28.67.070 (1964).[6] As to access to administrative evaluations, we would assume that, since part of their objective is to help the teacher improve, their content is made known to the teacher as a matter of policy.[7] Access as of right has been granted in a number of states. *E.g.*, Conn. Gen. Stat. Ann. § 10-15(a) (Supp. 1969). Finally, while access by a teacher to an administrator's frank appraisal of his ability might lead to embarrassment and friction if the teacher-administrator relationship were to continue, such a consideration is moot when the teacher has not been rehired. The relationship could be further impaired only in the unlikely case that the decision not to rehire were reversed despite negative reports; and in such a case, the avoidance of an unjustified non-retention must outweigh the danger of disharmony.

---

[5] *See* Frakt, *Non-Tenure Teachers and the Constitution*, 18 U. Kan. L. Rev. 27, 50-53 (1969).

Access to reports would seem to be a logical consequence of any right to receive a statement of reasons. To the extent that they are consistent with and foreshadow the reasons for non-retention, they both corroborate and give some depth to those reasons. To the extent that, as in the instant case, prior reports do not foreshadow dissatisfaction on the part of the teacher's superiors, the right to access would tend to restrain a board from assigning capricious reasons for its present dissatisfaction.

[6] Alaska entitles a non-tenured teacher to a statement of reasons and a complete bill of particulars. Alaska Stat. § 14.20.180(a) (1962). Further discussions of varying state procedures can be found in Frakt, *supra* at 28-30; and *Developments in the Law – Academic Freedom*, *supra* at 1091-92.

[7] In fact, appellant in this case has received some such reports, possibly all that exist.

We therefore hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.[8]

Appellant, however, argues further that the right to a statement of the reasons for not being rehired is meaningless unless the school board can be forced to prove those reasons at a hearing. As an initial response, we note that a hearing is not constitutionally compelled in all cases where individual rights may be impaired.

> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra* at 894-95.

It is obvious that the kind of hearing sought by appellant, *see* note 1, *supra*, would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board. Not only would the invoking of such adjudicative apparatus be an added, expensive and unfamiliar obligation for the school district, but the very existence of the right of a non-tenured teacher to such a hearing would have two side effects, equally unfortunate. In the first place, administrators would be less likely to recommend that teachers not be rehired if they knew that such a decision might require them to go through the time, expense, and often the personal discomfort of a full scale hearing. In such circumstances, the school board is more likely to tolerate incompetent teachers. At the same time, administrators would, to avoid these difficulties in the future, follow a counsel of over-caution in their hiring practices. The innovative teacher would have a more difficult time finding employment if school districts fear they cannot afford to take a chance on him. And the schools would be left with a teaching force of homogenized mediocrities.

Such risks and burdens for the school board might be tolerable if the right to a hearing gave promise of high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher. We therefore inquire as to the

---

[8] A similar result, in a different employment situation, was reached in *Olson* v. *Regents of the University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969).

nature of these interests and the extent to which they would be served by a hearing.*

One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions – assuming, of course, that the teacher is aware of the objections, as he would be if detailed notice is given. A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.

There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protecting himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. While an administrative hearing may help the teacher by way of flushing up constitutionally impermissible reasons, the chief beneficiaries are the school board itself, which can only profit from reviewing a decision before being subject to possible liability, and the courts, which do not seek unnecessary litigation.[10] From the teacher's point of view, there is little reason for him to prefer the prospect of two full scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are available, or, if not of this magnitude, it may be subject to a state court remedy in tort. *See* W. Prosser, *Handbook of the Law of Torts*, §126, at 1015-16 (3d ed. 1964). Moreover, an absolute safeguard against the possibility of covert bad

---

* We note, preliminarily, that in any such hearing the burden of persuasion, because of the subjective factors on which a school board may legitimately base its decision on rehiring, would rest on the teacher. For example, testimony concerning a teacher's failure to communicate enthusiasm to his students would have to be conclusory in nature – "He was, or was not inspiring". Even were we to require that appellant be given an administrative hearing, we think that she would have to bear the burden of persuading the decision-maker that the decision not to rehire her was an incorrect one; our research reveals no authorities who argue that the school board should bear the burden of proving its decision correct. *See, e.g., Developments in the Law – Academic Freedom, supra* at 1092; Note, 44 N.Y.U.L. Rev. 836, 842-43 (1969).

[10] We therefore normally require resort to available administrative hearing prior to initiation of a section 1983 action. *See Dunham* v. *Crosby*, – F.2d –, n. 2 (1st Cir., decided this date).

faith would involve school boards delegating crucial rehiring decisions to third parties – a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures.[11]

We recognize that there may, under our solution, be rare instances where an improperly dismissed teacher would not be adequately protected. We wish to stress, however, that our decision here is limited to the case of a non-tenured teacher whose contract is not renewed during a probationary period. Non-tenured teachers are made aware that they have no right to reemployment by their employment contracts which run for only one year and which entitle them to a hearing only if they are dismissed during the course of the year.[12] While it is true that the effect of a decision not to rehire may be the same as dismissal, the teachers have made a contract which entitles them to procedural rights only when they are dismissed. Teachers are not powerless to change the terms of their contracts; the procedural rights of non-tenured teachers who are not rehired vary widely from state to state. *See Developments in the Law – Academic Freedom, supra* at 1091-92. Non-tenured teachers who do not like

---

[11] In *Roth* v. *Board of Regents, supra*, cited with approval by appellant, the court stated "[I]t is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer. . ." 310 F. Supp. at 978. We find it difficult to believe that the scrutiny by either an administrative or a judicial hearing of a decision made on such nebulous but admittedly valid grounds would afford a teacher meaningful protection from arbitrary decisions.

Similarly, we think a requirement that a teacher be afforded an administrative hearing if he makes a constitutional claim or a claim of an actionable wrong, *see Sindermann* v. *Perry, supra*, offers the teacher little more protection than the status quo. Presently, the teacher can make such a claim in the courts, a forum undoubtedly more suited to evaluating them.

[12] Although the requirement that non-tenured teachers be notified by March 15 if they are not to be reemployed may be interpreted as giving the teacher a right to a continuing contract unless notified, the primary right is to notice, not to continued employment. Without a fixed date by which notice must be given, New Hampshire teachers might not have time to search for another job if they were not rehired. To compel school districts to notify teachers in time, the districts are required to offer a contract if they fail to give timely notice. Thus, while non-tenured teachers have a right to notice, they have no right to be rehired except to enforce the notice requirements.

the terms of New Hampshire's contracts can either bargain to change them[1] or can seek employment in states where the terms are different. Thus, in balancing the interests of the school board and the teacher, we must remember that the teachers have agreed to the procedural scheme and that teachers are not powerless to alter the scheme or find employment under a different scheme.

Under the circumstances, we hold that a hearing is not required and that the interests of society, in promoting a better school system, and in protecting the rights of the individual, are best served by the solution we put forth. Since, however, this solution is novel, the defendant cannot in fairness be subjected to the sanctions which ordinarily accompany the violation of pre-existing law. *Cf. Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). We apply the rule developed in this opinion to the appellant, in the event that the court finds that no such reasons have been given, by assuring her of a forthcoming communication of the reasons for her non-retention. We will apply the rule in the future only to those cases where a decision not to rehire is made subsequent to the date of this opinion. It also follows that appellant's claim for damages must be denied.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

[1] Since the provisions of New Hampshire's contracts are determined by law, this is not a normal collective bargaining situation, but to say that teachers cannot bargain to alter laws that affect the terms and conditions of their employment would require the court to shut its eyes to what has happened in the past few years in bargaining between public employees and their employers. *See generally*, Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L. J. 1107 (1969).

Case Number 5

Brief prepared by Bradley Kidder, Esquire and included with his kind permission. JEB.

STATE OF NEW HAMPSHIRE
Rockingham SUPREME COURT Superior Court

RICHARD L. STONEMAN

vs.

TAMWORTH SCHOOL DISTRICT et als

31 May 1974

FACTS:

1. The plaintiff was a teaching principal in the Tamworth School District.

2. In early March, 1973, the superintendent of schools recommended to the school board that the plaintiff be reemployed for the 1973-1974 school year.

3. On March 12, 1973, the Tamworth School Board met in closed session without giving public notice.

4. The Tamworth School Board voted 2 to 1 to terminate the plaintiff's contract at the end of the school year.

5. On 13 March 1973 the superintendent advised the plaintiff by letter that his contract would not be renewed for the following year.

ISSUE:

WHETHER THE FAILURE OF THE TAMWORTH SCHOOL BOARD TO PROVIDE NOTICE OF A MEETING AT WHICH IT VOTED NOT TO RENEW THE PLAINTIFF'S CONTRACT AS TEACHING PRINCIPAL VIOLATED RSA CHAPTER 91-A (Supp 1973) SO AS TO INVALIDATE THE VOTE?

HOLDING:

Yes.

RATIONALE:

1. RSA 91-A:2 (Supp 1973) requires that a notice of the time and place of the meetings of a school board must be posted in two appropriate public places or printed in a newspaper of general circulation at least 24 hours prior to such meeting.

2. Only executive sessions and several specifically enumerated proceedings are exempt from this requirement.

3. There is no question that a final vote was taken by the school board on March 12, 1973, in reference to the non-renewal of the plaintiff's contract, that the meeting cannot be classified as an executive session.

4. RSA Chapter 91-A (Supp 1973) places the burden on the government to make its proceedings public.

5. Where the government has failed to comply with its duties under RSA Chapter 91-A (Supp 1973), it must run the risk that its action will be invalidated.

6. As the plaintiff was a controversial figure, it is apparent that an open meeting should have been held as a safeguard against improper official conduct.

Case Number 6

Grafton
No. 6964

DONALD W. HAWTHORNE

vs.

THE DRESDEN SCHOOL DISTRICT

August 15, 1974

Baker & Page and *Lawrence A. Kelly*, by brief, for the plaintiff.
Stebbins & Bradley (*Mr. David H. Bradley* orally) for the defendant.

GRIFFITH, J. The sole issue to be determined in this case arising from a petition for declaratory judgment and injunction is whether RSA Ch. 43 hearing disqualification standards apply to school boards at tenured teacher nonrenomination hearings conducted pursuant to RSA 189:14-a. The Trial Court (*Mullavey*, J.) reserved and transferred the foregoing question without ruling. This case was argued together with *Farrelly v. Timberlane Reg. School Dist.* (decided today), which involved the same issue raised here. Counsel for the plaintiff deferred to Attorney Middleton whose oral argument in the *Farrelly* case supports plaintiff's position here.

Plaintiff, Donald W. Hawthorne, is a certified industrial arts and social studies teacher who has been employed by defendant, The Dresden School District, since September, 1964. The Dresden Board of School Directors voted to eliminate plaintiff's position as Audio-Visual Director of the Hanover Junior-Senior High School and the 1974-75 approved school budget provides no funds for that position. Since there were no other available positions in plaintiff's department, Raymond G. Edwards, Superintendent of the Dresden School District sent him written notification on March 1, 1974, in compliance with RSA 189:14-a, that he had not been renominated for the coming school year. After receiving the superintendent's letter on March 4, 1974, plaintiff seasonably notified defendant that he intended to exercise his right as a tenured teacher to a hearing before the school board under RSA 189:14-a. Plaintiff was duly notified that a hearing had been scheduled for April 5, 1974.

On March 27, 1974, plaintiff wrote defendant advising it that those members of the school board who had participated in the decision to eliminate his position were disqualified under the provisions of RSA 43:5 and 6 from acting as decisionmakers at the nonrenomination hearing. RSA 43:6 provides in pertinent part: "No selectman or other officer shall act, in the decision of any such case, who would be disqualified to sit as a juror . . . in the trial of a civil action in which any of the parties interested in such case was a party." Defendant expressed the opinion that RSA ch. 43 does not govern RSA 189:14-a hearings and refused to agree to plaintiff's request to continue the April 5, 1974 hearing until the issue of the applicability of RSA 43:6 could be determined.

Before transferring the case to this court the trial court enjoined defendant from holding the scheduled hearing until the issue could be determined.

Based on our decision today in *Farrelly v. Timberlane Reg. School Dist.*, we hold that RSA ch. 43 does not govern RSA 189:14-a hearings and therefore that statute provides no basis for disqualification of those members of the school board who participated in the decision to eliminate plaintiff's teaching position.

Petition dismissed.

GRIMES, J., did not sit; the others concurred.

Case Number 7

Rockingham
No. 6963

ELLEN FARRELLY *& a.*

vs.

TIMBERLANE REGIONAL SCHOOL DISTRICT *& a.*

August 15, 1974

McLane, Graf, Green & Brown, Jack B. Middleton and *Bruce W. Felmly* (*Mr. Middleton* orally) for the plaintiffs.

Soule & Leslie (Mr. Lewis F. Soule orally) for the defendants.

Nighswander, Lord, Martin & KillKelley and *Bradley F. Kidder* (*Mr. Kidder* orally) for the New Hampshire School Boards Association as amicus curiae.

GRIFFITH, J. This is a petition for declaratory judgment and injunctive relief brought by Ellen Farrelly and other striking tenured teachers against the Timberlane Regional District School Board as a result of a vote by the defendant board, after a hearing conducted pursuant to RSA 189:14-a, not to renew the contracts of the plaintiffs for the 1974-75 school year. A hearing was held before a Master (*Leonard C. Hardwick*, Esquire) who made findings of fact and recommended that plaintiffs' request for an injunction be denied. After approval of the master's report by the Trial Court (*Morris*, J.), plaintiffs excepted to the order and filed motions to set it aside and to supplement the record. A hearing was held on their motions before the master who recommended that they be denied. The trial court approved the master's recommendation, denied plaintiffs' motions and reserved and transferred all questions of law raised by their exceptions.

This case arises from the continuing contract dispute and strike with which this court dealt in *Timberlane Reg. School Dist. vs. Timberlane Reg. Educ. Ass'n.*, 114 N.H., 317 A.2d 555 (1974) and in *Timberlane Reg. Educ. Ass'n. v. Crompton*, 114 N.H., 319 A.2d 632 (1974). In the first Timberlane decision we upheld the recommendation of the master and the trial court's approval of that recommendation not to issue an injunction against the striking Timberlane teachers. In the second Timberlane case we held under RSA ch. 91-A (the "Right to Know" law) that the striking teachers, as citizens, had a right to the disclosure of the names and addresses of the substitute teachers who were replacing them during the strike.

On March 13, 1974, the school superintendent pursuant to RSA 189:14-a notified the striking teachers by mail that they had not been renominated to positions in the Timberlane Regional School District. Under the same section tenured teachers are entitled to request a hearing before the school board as well as the reasons for the superintendent's failure to renominate them. The tenured teachers did request a hearing and a list of reasons for their not being renominated. On March 22, 1974, the superintendent informed the teachers by

mail that a hearing before the board had been scheduled for March 28, 1974, and listed the following as his reason for failing to renominate them: failure to carry out their teaching responsibilities; failure to report to carry out their teaching duties; participating in a strike; and breach of contract by failing to report to work.

On March 28, 1974, a hearing was held before the school board. The teachers were represented by their chosen counsel and much of the hearing consisted of examination of the school superintendent by him. While the teachers were personally given an opportunity to bring to the board's attention any matters which they considered relevant, they chose to leave the presentation of their case to their attorney. The board reached no decision at the March 28 hearing, meeting again on April 4, 1974. At that meeting counsel for the teachers notified the board by letter that it was disqualified from acting on the superintendent's failure to renominate them. The board disregarded that assertion and by unanimous vote found the following facts: (1) the teachers were under contract with the Timberlane District; (2) they did not report to work between February 27, and March 12, 1974; (3) they did not offer any valid reason for their absence during that time; (4) they were given full opportunity to explain why they did not return to work. Lastly, on the basis of the foregoing facts the board carried a motion to sustain the superintendent's recommendation by a vote of 7 to 2.

The first question for our determination is whether the master erred in finding that the plaintiffs had waived their right to a hearing in accordance with RSA ch. 43 by failing to seasonably object to the school board's sitting in judgment at the hearing. The master found in this regard that the school board was disqualified under RSA ch. 43 from sitting at the contract non-renewal hearing (RSA 189:14-a), because under RSA 43:6 an officer who would not have qualified as a juror in a "civil action in which any of the parties interested in such case was a party" is disqualified from sitting at such a hearing. The master concluded, however, that the "mere fact of disqualification does not void the decision of the board" because their decision is merely voidable until properly challenged, and the plaintiffs' failure to seasonably object to the board's sitting at the hearing constituted a waiver of their right to object.

Since in our opinion RSA ch. 43 does not apply to a hearing under RSA 189:14-a, it is unnecessary for us to determine whether the master was correct in finding that the plaintiffs had waived their right to object to the school board's acting at the hearing. The hearing provisions under RSA 189:14-a are independent of the provisions of RSA ch. 43, since the latter statute is essentially the same as G.S. ch. 223 which was in existence in 1867 and the former was not enacted into law until 1957 (Laws 1957, 285:1). It cannot be reasonably argued that the legislature intended the provisions of RSA ch. 43 to apply to RSA 189:14-a hearings. Neither the legislative history of RSA 189:14-a (see N.H. S. Jour. 688-89 (June 11, 1957)) nor the decisions construing that section have ever made reference to RSA ch. 43. See *Plymouth School Dist. v. State Bd. of Educ.*, 112 N.H. 74, 289 A.2d 73 (1972); *Spencer v. Laconia School Dist.*, 107 N.H. 125, 218 A.2d (1966). "It is a well established principle of

statutory construction that a long-standing practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the Legislature is evidence that such a construction conforms to the legislative intent." *New Hampshire Retail Grocers Ass'n. v. State Tax Comm'n.*, 113 N.H., 309 A.2d 890, 892 (1973). To construe the strict judicial trial-like standards of RSA ch. 43 as applicable to either the hearing provisions of RSA 189:14-a or b would be to disregard the obvious intent of the legislature in providing an exclusive and independent statutory framework for teacher nonrenomination proceedings complete with hearings at both local and state levels. *Spencer v. Laconia School Dist.*, 107 N.H. 125, 130, 218 A.2d 437, 441 (1966). The passage of such a complete statutory scheme "is a legislative declaration that whatever is embraced in the new law (RSA 189:14-a and b) shall prevail, and whatever is excluded (RSA ch. 43) is discarded." *Tilton v. Sanbornton*, 78 N.H. 389, 394, 100 A. 981, 983 (1917). Clearly no school board would be qualified to act as decisionmaker under RSA 189:14-a if the standards of RSA ch. 43 were applied and the decision would thus "be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions." *Simard v. Board of Educ. of Town of Groton*, 473 F.2d 988, 993 (2d Cir. 1973).

While for reasons hereinafter stated we do not find that plaintiffs as tenured teachers were entitled to the benefits of RSA 189:14-a, it does not appear from the facts of this case that they were denied due process at the hearing they received. The master found and the record indicates that they were accorded a full and fair hearing with an opportunity to cross-examine witnesses who appeared against them. Plaintiffs' assertion that they were denied due process because the school board's prior involvement in the case rendered it impossible for them to act as an impartial decisionmaking body, is unsupported by any showing of actual bias or prejudice and it is well established that prior involvement in itself is not a sufficient ground to bar a statutory administrative body from acting as decisionmaker at an otherwise full and fair hearing. *Quinn v. Concord*, 108 N.H. 242, 244-45, 233 A.2d 106, 108 (1967); *N.H. Milk Dealers' Ass'n. v. Milk Control Board*, 107 N.H. 335, 338-39, 222 A.2d 194, 198 (1966); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Wilson v. Lincoln Redevelopment Corp.*, 488 F.2d 339, 342 (8th Cir. 1973); *Simard v. Board of Educ. of the Town of Groton*, 473 F.2d 988, 993 (2d Cir. 1973).

The parties and the master presumed in this case that plaintiffs had retained their tenured status and so were entitled to the benefits of RSA 189:14-a. If this were a strike arising out of an ordinary labor dispute the master would be correct in holding by inference that the plaintiffs had not lost their status as employees and were therefore entitled to benefits of their employment provided by statute. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), 29 U.S.C.A. S 152(3) (1973). However their continued status as teachers was not guaranteed during the strike if the strike were illegal (*Auto. Workers v. Wisconsin Bd.*, 336 U.S. 245 (1949)) or in violation of an employment contract. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

Timberlane Reg. School Dist. v. Timberlane Regional Educ. Ass'n., 114 N.H., 317 A.2d 555 (1974) did not declare a strike by public employees legal. Rather it reaffirmed the ruling in *Manchester v. Guild*, 100 N.H. 507, 131 A.2d 59 (1957) and noted that in most jurisdictions a strike by public employees is prohibited either by statute or by judicial decision. Annot., 37 A.L.R. 3d 1147 SS 2, 3 (1971, Supp. 1973); 3A C. Antieau, Local Government Law S 30 c.15, at 30c-44 (1970); 16 E. McQuillin, Municipal Corporations S 46.13, at 704 (3d ed. rev. 1972). "It is not a proper judicial function to make policy judgments as to the merits of providing public employees with the right to strike or of developing alternative processes such as compulsory mediation or arbitration to resolve government labor disputes . . . (citations omitted). This decision must be made by the legislature." *Timberlane Reg. School Dist. v. Timberlane Reg. Ed. Ass'n.*, N.H., 317 A.2d 555, 557-58 (1974), *Dover v. Int'l. Ass'n. of Firefighters, Local 1312*, (decided July 19, 1974). When the plaintiffs elected to engage in an illegal strike the defendant was not required to continue to treat them as employees and accord them the right of tenured teachers. *National Ed. Ass'n., Inc. v. Lee Cty. Bd. of Public Instr.*, 467 F.2d 447 (5th Cir. 1972); *Miller v. Noe*, 432 S.W. 2d 818 (Ky. 1968); *Miller v. Board of Educ. of Jefferson Cty. Kentucky*, 452 F.2d 894 (6th Cir. 1971).

In *Manchester v. Guild*, 100 N.H. 507, 131 A.2d 59 (1957) the relevance of the individual teaching contracts to the legality of the strike was noted. The plaintiffs in this case struck during the term of their employment contracts, thereby breaking and abandoning their contracts. The statutory safeguards provided by RSA ch. 189 were intended to protect tenured teachers from arbitrary or unreasonable actions of school authorities while the teachers are under contract. *N.H.S. Journal* 688-89 (June 11, 1957). These provisions, however, cannot be read to the exclusion of the ordinary rules of contract law, which are also applicable to contracts between teachers and school boards. *Edgecomb v. Traverse City School Dist.* 341 Mich. 106, 116, 67 N.W. 2d 87, 91 (1954); 3A C. Antieau, Local Government Law S 30c.14, at 30c-42 (1970). Whether the plaintiffs' voluntary cessation of their teaching duties is referred to as a strike, a walk-out or a de facto resignation, the record indicates that they left their teaching posts on February 27, 1974, have not yet returned and expressed no willingness to return when the district superintendent indicated that they would be renominated if they did so. Under these circumstances the actions of the plaintiffs justified the school board in viewing its contracts with the plaintiffs as terminated through abandonment. "One who is himself guilty of a wrong for breach of a contract . . . should not seek to hold his counter-promisor liable." 6 S. Williston, Contracts S 813, at 5, 6 (3d ed. 1962); *Larose v. Porter*, 87 N.H. 241, 245 177 A. 297, 299 (1935); *Jakober v. E.M. Loew's Capitol Theater, Inc.*, 107 R.I. 104, 265 A.2d 429 (1970); *see* Restatement (Second) of Contracts S 266, at 67 (Tent. Draft No. 8, 1973). It cannot be said that plaintiffs retained "an objective expectancy of reemployment" (*National Educ. Ass'n., Inc. v. Lee Cty. Bd. of Pub. Instr.*, 467 F.2d 447, 452 (5th Cir. 1972); *Ferguson v. Thomas* 430 F.2d 852 (5th Cir. 1970)), and they have thereby placed themselves in the same position as untenured teachers who may be discharged

without a hearing. *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972); *see Fletcher v. Civil Serv. Comm'n. of City of Waukegan*, 6 Ill. App. 3d 593, 286 N.E. 2d 130 (1972); *United Fed'n. of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971).

Petition denied.

GRIMES, J., did not sit; the others concurred.

Case Number 8

DONALD R. CHASE

v.

FALL MOUNTAIN REGIONAL SCHOOL DISTRICT *et al.*

Civ. A. No. 3112.

United States District Court,
D. New Hampshire.
July 28, 1971.

Action by nontenured teacher against school district alleging that failure to renew his contract was a denial of his constitutional rights. The District Court, Bownes, J., held that dismissal of nontenured teacher on basis of uninvestigated complaints and unverified rumors, and admission by authorities of school district that their decision to dismiss did not depend upon the truth or falseness of the complaints and rumors, was patently unjust, arbitrary, capricious, and a violation of due process in relation to teacher who had been chief negotiator of teachers' association.

Judgment for plaintiff.

1. Constitutional Law – 318

School board which dismissed nontenured teacher did not violate procedural due process by failing to give teacher either a hearing or reasons for the decision not to renew his contract where the decision not to rehire teacher was made in March, 1970, and where decision of Court of Appeals in Drown case holding that a teacher has a right to be given reasons for the decision not to renew his contract would only be applied to those cases where the decision not to rehire was made subsequent to date of the opinion, which case was decided in December, 1970.

2. Schools and School Districts – 133.15

A nontenured teacher is protected from arbitrary, discriminatory, or capricious nonrenewal of his contract.

3. Constitutional Law – 82

When the ability to pursue a profession and reputation are involved, fundamental constitutional rights are to be strictly protected to prevent arbitrary state action.

4. Constitutional Law – 318

Dismissal of nontenured teacher on basis of uninvestigated complaints and unverified rumors, and admission by authorities of school district that their decision to dismiss did not depend upon the truth or falseness of the complaints and rumors, was patently unjust, arbitrary, capricious, and a violation

of due process in relation to teacher who had been chief negotiator of teachers' association. U.S. C.A. Const. Amends. 1, 14.

5. Schools and School Districts – 142

Common-law immunity did not apply in favor of school district, as far as equitable prayer for relief was concerned in action against it by nontenured teacher who had been discharged, where assuming that good faith prevented imposition of compensatory damages for back pay, evidence required a finding that school district did not act in good faith.

6. Schools and School Districts – 142

Where uncontroverted testimony of nontenured teacher who was improperly discharged was that his salary would have been $7,650 for the school year 1970-71, and that he lost at least one-third of his salary as a result of being unemployed, damages of $2,550 would be awarded, and wages earned by teacher as a short order cook for two weeks in the summer would not be deducted since there was no evidence that summer employment was prohibited by school district.

Jack B. Middleton, Peter B. Rotch, McLane, Carlton, Graf, Greene & Brown, Manchester, N.H., for plaintiff.

John J. Zimmerman, Faulkner, Plaut, Hanna & Zimmerman, Keene, N.H., for defendants.

OPINION

BOWNES, District Judge.

Donald R. Chase brought this action relying on 42 U.S.C. § 1983 (1964) against the Fall Mountain Regional School District, and individually against the superintendent, assistant superintendent, and members of the School Board. Plaintiff alleges that the failure of the School District to renew his contract for the 1970-1971 school year is: (1) a denial of his constitutional rights of freedom of speech and association because the decision of the defendants was based in whole or in part on his activities as a negotiator for the Teachers' Union; and (2) a denial of his Fourteenth Amendment right of due process of law in that the action of the School Board was arbitrary, discriminatory, and capricious. Jurisdiction is based on 28 U.S.C. § 1343(3). The case was tried without a jury.

FINDINGS OF FACT

On March 3, 1970, the School Board of the Fall Mountain Regional District, on recommendation of Stanley Tufts, Superintendent of the School District, voted 5-2 not to renew plaintiff's teaching contract. To ascertain the reasons that brought about this vote, a detailed examination of the facts is required. At the outset, it should be made clear that the evidence discloses, the defendants concede, and I find that the plaintiff is a well qualified, conscientious, and very competent teacher. He developed a program of library training

as part of his freshman English classes which is still used today and was developing a new course in Journalism before his contract was not renewed. The facts present a distressing example of how a competent, innovative, and outspoken teacher can have his entire career effectively blighted by a school superintendent's and school board's blatant disregard of his rights and of the most elemental concepts of justice and fair play.

Upon his graduation from Plymouth State College, the plaintiff received a professional standards teaching certificate from the State of New Hampshire. He taught English at Towle High School in Newport, New Hampshire, from January of 1963 to June of 1965. Although his contract was renewed at Towle for the school year 1965-1966, the plaintiff left teaching and became general manager of radio station WCNL in Newport, New Hampshire, because the salary was substantially higher than his teacher's salary. In the spring or early summer of 1968, the plaintiff decided to leave the radio station and return to teaching because of a change of management at the station.

Henry Bremner, who retired in the early fall of 1968, was the Superintendent of Schools at the time plaintiff was hired by Fall Mountain Regional High School (hereinafter FMRHS) in the summer of 1968. He received two recommendations, one from Howard Kimball, the Principal of Towle High School when plaintiff taught there, and another from Eve Spanos, an English teacher at Towle. Pl.Ex. 14. Both of the recommendations rated the plaintiff "above average" or "best" in almost every category. Mr. Bremner offered, and plaintiff accepted, a position in the English Department at FMRHS for the school year of 1968-1969.

During the school year 1968-1969, plaintiff was an active and outspoken member of the Teachers' Negotiating Committee which was attempting to reach an agreement on teachers' salaries with the School Board. Gordon Gowen, father of one of the girls who complained about the plaintiff in 1970, was the chief negotiator for the School Board during the 1968-1969 school year. During the months of January and February of 1969, the plaintiff issued a number of press releases highly critical of the School Board. The members of the School Board knew the plaintiff was the source of the articles, and he was named in two of the press releases which accused the School Board of "high-handed treatment" and "utter disregard" of its employees. Pl.Ex. 1 & 2. Mr. Tufts, Superintendent of Schools in the District, stated that these releases irritated him because they violated an informal agreement between the School Board and the teachers not to issue press releases without approval of the other party. Mr. Tufts felt that these releases created public animosity toward the School Board and constituted unprofessional conduct by the plaintiff. This view was also expressed in the testimony of four of the five School Board members who voted for non-renewal at the March 3, 1970, meeting. Mr. Hubbard, who was not present at the March 3, 1970, meeting stated that all of the Board members were very upset with the plaintiff because of these press releases. The plaintiff testified that Gordon Gowen and he had many heated arguments in the negotiating sessions and that Mr. Gowen was upset the most by the press releases.

Notwithstanding the press releases of January and February of 1969, Superintendent Tufts recommended that the plaintiff's contract be renewed for 1969-1970. Plaintiff's Exhibit 8 indicates that the Principal of FMRHS, Edward Willis, strongly recommended plaintiff for renewal and rated him excellent or good to excellent in every category. Although there was some discussion about the plaintiff's negotiating activity and the press releases at the March, 1969, School Board meeting when renewals were considered, plaintiff's contract was renewed unanimously.

During the 1968-1969 school year, there were no complaints from any students regarding the plaintiff's conduct. Paul Marx was the only School Board member who testified that he heard rumors about the plaintiff in 1968. He did not state what the rumors were, but did state that acquaintances in Newport told him they were glad that the plaintiff was in the Fall Mountain District and not in the Newport District.

The critical period is the 1969-1970 school year, particularly the month of January, 1970. In October or November of 1969, Jack Eno, President of the Fall Mountain Teachers' Association, appointed plaintiff the Chairman of the Teachers' Negotiating Committee. Mr. Eno testified that shortly after he appointed plaintiff, Superintendent Tufts told him that the choice of plaintiff as chief negotiator was not a wise one because he antagonized the School Board.

As chief negotiator for the teachers, plaintiff attempted to obtain from the School Board a lengthy and comprehensive agreement covering many conditions of employment. Pl.Ex. 6. The teachers were attempting to obtain authority and responsibility in matters which had always been controlled exclusively by the administration. As the negotiating sessions proceeded through December and early January, plaintiff became more and more disenchanted with the School Board's attitude toward the comprehensive contract and toward him personally. On January 12, 1970, plaintiff, without explanation, abruptly left a negotiating session and did no further negotiating. The members of the School Board testified that plaintiff resigned as negotiator at this January 12 meeting. However, a letter to teachers from plaintiff (PL.Ex. 5) implicitly, if not explicitly, indicates that the plaintiff was still Chairman of the Negotiating Committee as of January 13, 1970. It also explicitly states that plaintiff considered further meetings with the School Board meaningless.

> The committee has concluded that negotiations, as such, have not taken place and that further meetings will only serve to delay decisions which each individual teacher must make. We believe that until the situation is presented to the Association, further meetings with the Fall Mountain Regional School Board could in no way serve the best interest of either the students or the teachers of the Fall Mountain Regional School District.

This letter indicates to me that plaintiff was exercising his prerogatives as Chairman of the Negotiating Committee and was recommending a boycott of negotiations until at least the January 20 meeting of the Association. At this meeting, the plaintiff announced that he would no longer serve as negotiator because he was convinced that the School Board's animosity toward him

prevented him from being an effective spokesman for the teachers. Plaintiff also severely criticized the School Board personally at this meeting and stated that he had no personal respect for the School Board negotiating team, the School Board itself, or the superintendent of schools. The negotiations were subsequently taken over by Mr. Eno and, in his words, "an unsatisfactory agreement" was finally reached.

During the same period from January 12 to January 20, when plaintiff boycotted the negotiating sessions, the other important facts in this case began to surface. On Monday or Tuesday, January 12 or 13, Janet Haslip, a freshman at FMRHS, made a complaint to Mr. Willis and Arthur Gude, the Assistant Principal, regarding the plaintiff's giving her special attention and touching her on one occasion in the library. On Friday, January 16, Barbara York and Gail Gowen, daughter of Gordon Gowen, made complaints to Mrs. Gude, a teacher at FMRHS and wife of the assistant principal, regarding the plaintiff's conduct toward them.

Miss Haslip entered FMRHS sometime in late October or early November as a transfer student from Rhode Island. The plaintiff spent extra time with her to enable her to catch up with the class and had asked her to do special work such as leading class discussions. She testified that she was upset because, as a result of this special attention, her fellow students sometimes said: "How's your boy friend, Mr. Chase?" She also testified that she thought the plaintiff was interfering with her privacy when, after learning that she was going to the doctor's after school, he asked if she was ill and requested that she let him know if everything was all right.

Miss Haslip testified that the touching incident took place in the library during a study hall. It consisted, according to her testimony, of the plaintiff putting his hand on the back of her chair and his fingers touching and rubbing her back. She also stated that plaintiff sat down at the table and intentionally put his hand on top of her hand. There were at least ten people in the library at this time, and one girl was sitting directly across the table from her when this incident happened. She also testified that when she left the library, the plaintiff touched her elbow in full view of the librarian.

These were the only incidents Miss Haslip complained of, but she also testified that the plaintiff gave the class vocabulary words to learn which had a "dirty" meaning. The only concrete example that she could give was the word "nocturnal". According to Miss Haslip, the plaintiff stated, after the class knew the word's meaning, that he was a "nocturnal man." On cross-examination, it was brought out that Miss Haslip had a relatively poor academic record, had been truant from school during the spring of 1970, had flunked plaintiff's English course, and had spoken with Gail Gowen about Mr. Chase prior to her complaint.

Sometime shortly after this complaint, Mr. Willis and Mr. Gude met with the plaintiff who denied the alleged touching and stated that if any touching did occur, it was unintentional.

Miss Haslip's guardian apparently called Gordon Gowen on January 12 or 13 and told him of his ward's complaint. Mr. Gowen was still a member of

the School Board, although not a member of the School Board's Negotiating Committee during the school year 1969-1970. Mr. Gowen testified that his daughter, Gail, who had the plaintiff as a teacher in sophomore English, had mentioned things about plaintiff and he, therefore, brought the matter to the attention of Superintendent Tufts at a meeting of the School Board Finance Committee on January 14. On January 15, Superintendent Tufts met with Mr. Willis and Mr. Gude because it was his policy to have this type of thing resolved by the administrator closest to the situation.

After school the next day, Friday, January 16, Gail Gowen, Gordon Gowen's daughter, and Barbara York complained about the plaintiff to Mrs. Gude, a teacher at FMRHS and wife of the assistant principal. On January 20, Mr. Willis met with Miss Gowen and Miss York. Although both girls testified that they did not remember exactly what incidents they discussed with Mr. Willis, I must assume that their testimony covers most of their complaints, particularly those they considered most offensive.

Barbara York and Gail Gowen were good friends, and both of them had the plaintiff for freshman English in the 1968-1969 school year and for sophomore English in the 1969-1970 school year. Miss York had no complaints about the plaintiff's conduct in freshman year and stated that plaintiff had never touched her and she had never seen him touch anyone else at any time. Her major complaint involved an incident in class in the late fall of 1969 when the plaintiff asked her to turn off the lights when the class was going to see slides or a movie. She testified that as she turned off the lights she said "Aren't I talented," and the plaintiff made a comment with a "dirty" connotation. Although Miss York could not remember the specific comment, she stated on cross-examination that it had a double meaning, one of which was not "dirty." She testified that the comment upset her because the class laughed. The only other incident involved talk by the plaintiff of measuring her skirt when the class was discussing the school dress code. Miss York was apparently not upset by this comment and could not remember whether it happened in freshman or sophomore year. She also testified that "I always felt as if he was looking me up and down," but there was "nothing specific or general" about his conduct.

Most of the complaints came from Gail Gowen, the daughter of School Board member Gordon Gowen. She testified that the plaintiff had touched her on at least two occasions, had made numerous personal remarks to her in class, and had made remarks of a "dirty" nature in class. Miss Gowen, like Miss York, had no complaints about the plaintiff in freshman year. The claimed touching incidents occurred on separate occasions in the 1969-1970 school year. The first was after school during the fall when she and Barbara York were walking down the hall. She testified that the plaintiff called her over and asked if she could defend herself against attackers. She testified that he told her not to scream and touched the side of her neck to show her where a "pressure point" was. Miss Gowen testified that the plaintiff did not hurt her and she just backed away. Miss York, who Miss Gowen said was present at the time, stated emphatically on cross-examination that she had never seen the plaintiff touch Gail at any time.

The second alleged incident occurred in the hall between classes on the day she made the complaint. Miss Gowen testified that she was walking down the hall with a group of students between classes and that the plaintiff was walking past her with another teacher. She testified that the plaintiff said something like "Did you hear about Gail Gowen?" or "There's Gail Gowen" and touched her elbow. After this incident, she testified that she and Barbara York jointly decided to complain. Miss Gowen also testified that the plaintiff sometimes put his hand on the back of her chair and touched her back "like it was accidental." She also testified that he stared at her and other girls in the hall and raised his eyebrows, and that plaintiff's facial expressions in general bothered her.

Miss Gowen further testified that the plaintiff spoke of her "love life" before class started and sometimes called her "Bessie-the-cow" or "farm girl" in class because her father owned a farm. Miss York corroborated this testimony. On cross-examination, Miss Gowen admitted that "Bessie-the-cow" and "farm girl" "didn't really bother me that much." Janet Fisk, one of Miss Gowen's classmates, testified that Miss Gowen was having trouble with her boyfriend in January and that the only time she heard the plaintiff speak of Miss Gowen's "love life" was when she came into the classroom crying and plaintiff tried to cheer her up. Miss Gowen also testified that the plaintiff said something like "I know what's on the mind of the class" when the class said the meaning of a word used in mythology was prostitute. She couldn't remember the exact word, but from her testimony, I would guess it was "siren."

On cross-examination, Miss Gowen stated that prior to her complaint, Mr. Chase had upset her because of the way he talked about the School Board in class. She knew plaintiff was the chief negotiator for the teachers, and she was upset because she thought he conveyed to the class that he was better than her father.

Both Miss Gowen and Miss York testified that they had been reprimanded in class by the plaintiff for their behavior in an English class taught by a teacher substituting for the plaintiff. The plaintiff, Miss York, and Miss Gowen all agreed that the plaintiff refused to sign a bus pass enabling them to get a "late bus" after school. Presumably, a late bus pass would have been an affirmation by plaintiff that the girls had been detained for good reason and were, therefore, entitled to late transportation home. Miss York and the plaintiff agreed that the reprimand and the refusal to sign the bus pass took place on the day the two girls complained to Mrs. Gude, but Miss Gowen was unsure of the date. Both girls insisted that this had nothing to do with their complaint. Janet Fisk stated that Miss Gowen and Miss York told a group of students that they were going to complain as sort of a joke and, after they had complained, they were laughing as they told other students what they said to Mrs. Gude.

All four of the girls who testified stated that there were rumors around the school that the plaintiff had had an affair with a secretary in Newport and dated a high school girl when a senior at Plymouth State. They also stated that

the plaintiff was called a "dirty old man" by a number of students. It is important to note that there was no testimony as to exactly when these rumors and the phrase "dirty old man" started. Janet Haslip testified that they started after the touching incidents and the complaints to the principal. This would be the logical and probable time for such rumors to start. It is significant to note that Miss Gowen testified that she passed these rumors on to her father.

Shortly after January 20, Mr. Willis again spoke with the plaintiff. The plaintiff again denied any touching and stated that any touching which might have occurred was unintentional. Mr. Willis told the plaintiff that there was no place for touching in FMRHS and that some girls are overly sensitive to personal remarks. Between then and March 3, Mr. Willis completed his recommendation regarding the renewal of the plaintiff's contract. Mr. Willis strongly recommended that the plaintiff be rehired and rated him excellent in every one of the seventeen categories on the form, including "relationship with students." Pl.Ex. 10. Mr. Willis testified that he strongly recommended the plaintiff's renewal because he "had no proof of any impropriety."

At this point in time, Superintendent Tufts apparently took things into his own hands. He attempted to check the Newport and Plymouth rumors by phone, but got no results from either attempt and the rumors remained unverified. The only result of this limited effort was to feed more fuel to the flames of gossip and rumor. The plaintiff testified that the Newport rumor was completely false and that he was engaged to his wife, to whom he is still married, while a senior at Plymouth State College. Superintendent Tufts testified that he received inquiries and complaints from parents about the situation and that some parents asked that their children be removed from plaintiff's class.

Mr. Tufts testified that the complaints by the girls, the unsubstantiated rumors, and the telephone calls from parents led to his decision to recommend that the Board not renew plaintiff's contract. He recommended non-renewal because the plaintiff had "lost his effectiveness as a teacher in the District." This recommendation was made notwithstanding that: (1) Superintendent Tufts was not able to check the Newport and Plymouth rumors as to source, inception, or accuracy; (2) He had never spoken with the plaintiff or the girls, and the principal, who had done so, recommended renewal; and (3) In response to any complaints or inquiries from the community at large, he could have easily explained that the situation had been straightened out by Mr. Willis, or made it clear that there would be a full and complete investigation. The superintendent stated adamantly that the recommendation was made solely on the basis of complaints and rumors and that he would have made the same recommendation whether they were true or false.

At the March 3 School Board meeting, the School Board accepted Mr. Tufts' recommendation and voted 5-2 not to renew plaintiff's contract. Although the phrase "not to renew" or "non-renewal" seems less drastic than "dismissed" or "fired," its effect is the same. To put it bluntly, the plaintiff was fired. Gordon Gowen, Paul Cray, Robert Metcalf, Reverend Newell Bishop, and Paul Marx voted for non-renewal. Richard Minard and Paul Lamothe

voted against Mr. Tufts' recommendation. The other named defendants were not present or did not vote. Of the five voting for non-renewal, three (Mr. Cray, Mr. Metcalf, and Reverend Bishop) had heard no rumors or complaints about the plaintiff and nothing about the alleged touching incidents until the meeting. Mr. Marx testified that he had heard rumors in 1968-1969, but never stated what the rumors were. Four of the Board members voting for dismissal did not discuss the matter with the plaintiff or the three girls. Mr. Gowen, of course, had information from his daughter, but had not spoken to plaintiff.

All the members who voted to dismiss plaintiff knew that he was chief negotiator, but all said that this played no part in their decision. They also knew that it was illegal to fire a teacher for union activities. The five Board members, like Mr. Tufts, all testified that it made no difference whether the rumors and the complaints were true or false. Each testified that he thought the plaintiff had "lost his effectiveness." Three teachers at FMRHS, Miss LaBrie, the head of the English Department and plaintiff's immediate supervisor, Mr. Eno, President of the Teachers' Association, and Mr. Osgood all testified that they did not think the plaintiff had lost his effectiveness as a teacher.

On Tuesday, March 9, plaintiff was informed by a letter hand delivered by Assistant Superintendent Bellevance that his contract was not being renewed. Plaintiff testified that he asked Mr. Bellevance why he was being fired and was told that he had "lost his effectiveness in the district." Plaintiff was convinced that he had been fired for his negotiating activities and pressed for a more succinct answer. Mr. Bellevance testified that he implied to the plaintiff that the reason was his relationship with students, but he never directly said that it was a result of the complaints of the three girls and rumors in the community. The plaintiff was never explicitly given the reasons for his dismissal by the School Board or the Administration. Mr. Bellevance gave the plaintiff the option of resigning by Friday, March 12, or having the non-renewal on his record.

Sometime before March 12, plaintiff spoke to Mr. Hubbard, a member of the School Board who was not present for the vote, asking for reconsideration. Shortly thereafter, plaintiff was called by Mr. Bellevance and was told that the Board would not reconsider. Mr. Tufts testified that after March 3, reconsideration was out of the question and nothing would have changed the Board's mind, but he and the members of the School Board did testify that a hearing would have been held if plaintiff had requested it. Mr. Tufts testified that since the plaintiff's reputation was at stake, it was up to plaintiff to request a hearing. Since the testimony makes it clear that reconsideration was out of the question and since the decision was based on rumors, it is difficult for me to understand the purpose of a hearing other than an exercise in hypocrisy. In light of the fact that he had been informed that there would be no reconsideration, plaintiff understandably requested no hearing.

The plaintiff completed the remainder of the school year and there were no complaints of any kind about him. The plaintiff made every effort in the spring and summer of 1970 to locate a teaching position for the 1970-1971 school year, including applying for teaching positions fifty and sixty miles

from his home, but received no offers. He entered his name with the New Hampshire Education Association's placement service and ultimately with New Hampshire's Department of Employment Security. He was unemployed until December of 1970 when he was hired by the New Hampshire Education Association in a non-teaching position which pays a higher salary than he would be making as a teacher. In the spring of 1970, plaintiff was elected moderator of the Town of Croyden, and in the fall of 1970, he was elected to the New Hampshire Legislature as representative from Croyden and Cornish.

I cannot find from the evidence that the plaintiff was dismissed solely because of his activities as negotiator for the teachers. Nor can I find, however, that he was dismissed solely because of the complaints and rumors. Under these facts, I find that the plaintiff's dismissal was based both on his constitutionally protected rights and on the complaints of the three girls and the resultant rumors about his past conduct. The complaints, such as they are, and the unsubstantiated rumors are certainly surface reasons, but his activities as negotiator clearly contributed to what can only be termed as a total disregard and lack of concern on the part of a superintendent and a School Board as to the truth of the complaints and the rumors and the failure of the School Board and Mr. Tufts to objectively assess their effect on plaintiff's suitability as a teacher at FMRHS. Even if all the testimony of the girls is believed, and I find that much of it is exaggerated and some of it untrue, it is clear to me, as it apparently was to Mr. Willis, that the facts fall far short of demonstrating any impropriety by the plaintiff. The court takes judicial notice of the fact that girls of the age of those who complained here are at a stage of increasing sensitivity and awareness of the sexual relationship of man and woman. Consequently, any unintended or intended touching, even as innocent as the type complained of here, or any remarks or comments with the remotest sexual connotation, may be interpreted by a sensitive young girl in a way completely uncontemplated and unintended. This, plus the very important fact that Gail Gowen, a close friend of Barbara York and a friend of Janet Haslip, felt that the plaintiff was criticizing and down-grading her father, were important factors to be weighed in analyzing the situation – factors which Mr. Willis undoubtedly had considered when he strongly recommended renewal.

While I do not think the members of the School Board were deliberately lying when they said the plaintiff's negotiating activities had nothing to do with their decision, I cannot, and will not, believe that the School Board would dismiss a competent teacher solely on the basis of uninvestigated complaints of impropriety and unsubstantiated rumors of misconduct in the past. The plaintiff's negotiating activities had a profound bearing, either consciously or unconsciously, on the decision not to renew. The language of the Fourth Circuit Court of Appeals in Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), is appropriate here. There, the plaintiff alleged that she was not rehired because of her racial activity, and the School Board gave the reason for non-renewal as insubordination. The court said: "To accept * * * [this reason] we would have to pretend not to know as judges what we know as men." Id. at 182.

There is no doubt that a teacher may not be excluded from employment or dismissed in violation of his constitutional rights of freedom of speech and association. See, *e.g.*, Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970). But a School Board certainly has a right to dismiss a teacher who actually makes improper sexual advances toward female students, even if the teacher has exercised his rights of free speech and association and in so doing has antagonized the school administration. Cf. Robbins v. Board of Education, 313 F.Supp. 642 (N.D.Ill.1970). When a violation of constitutional rights is alleged, however, the reasons given for dismissal must be closely examined to make certain that they are not simply a facade to conceal the fact that dismissal was for activity protected by the Constitution. In this case, the evidence discloses that the reason given for dismissal was not entirely a facade, but based partially upon the decision of the superintendent and School Board that the complaints and rumors had nullified the effectiveness and competency that the parties agreed plaintiff exhibited prior to January of 1970. I must, therefore, disregard the First Amendment involvement for the moment and closely scrutinize the reason actually given by the School Board and superintendent, and the facts underlying that reason, to determine if the decision is constitutionally permissible. The plaintiff alleges that the decision of the School Board was arbitrary and capricious. The issue then becomes whether a non-tenured teacher is protected by the due process clause of the Fourteenth Amendment from an arbitrary, capricious, and wholly unreasoned decision not to renew his contract.

[1] The starting point in resolving this issue is Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970), cert. den., 402 U.S. 972, 91 S.Ct. 1659, 29 L.Ed.2d 137. There, the First Circuit held that a non-tenured teacher has no right to a hearing, but has a right to be given the reasons for the Board's decision not to renew. However, the court stated that, because this was a "novel" solution, the rule established in *Drown* would only be applied to "those cases where a decision not to rehire is made subsequent to the date of this opinion." Id. at 1188. Since *Drown* was decided in December of 1970, and the decision not to rehire the plaintiff was made in March of 1970, the plaintiff here was neither entitled to a hearing nor to the reasons for the decision not to renew. Consequently, the School Board did not violate procedural due process.

Drown, however, makes it clear that a teacher "has an interest in being rehired sufficient to prevent the school district from not doing so for constitutionally impermissible reasons." Id. at 1183. *Drown* also points out that freedom of speech and association are constitutionally impermissible reasons for non-renewal.

There remain the teacher's interest in protecting his con-

stitutional rights, such as free speech, and protecting himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. Id. at 1186.

The court further noted that "bad faith may rise to a constitutional level, in which case the federal courts are available . . ." Id. at 1187.

I am of the opinion that the decision in *Drown* implicitly recognizes a right of recovery for arbitrary, discriminatory, or capricious dismissal of a non-tenured teacher in violation of due process. Among the cases cited by the First Circuit for its conclusion that teachers' contracts cannot be terminated for constitutionally impermissible reasons is Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. den., 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967). There, as here, the contract was renewable at the discretion of the school authorities. The court specifically held: "[W]e find that the action of the school board was arbitrary and capricious." Id. at 182. The court went on to find that the only reasonable inference for dismissal of the plaintiff on the trivial charges involved was the School Board's objection to her racial activity.

[2] Although there is authority to the contrary, Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir.), cert. den., 396 U.S. 843, 90 S.Ct. 61, 24 L.Ed.2d 93 (1969), I think the better rule is that a non-tenured teacher is protected from arbitrary, discriminatory, or capricious non-renewal. This opinion finds strength in the decisions of the Supreme Court. In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), the Court struck down Oklahoma's loyalty oath for state officers and employees because it was an "assertion of arbitrary power" which "offends due process." Id. at 191, 73 S.Ct. 215. The Court stated:

> It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory. Id. at 192, 73 S.Ct. at 219.

This view was also expressed in Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In *Schware*, the Court reversed the Supreme Court of New Mexico's determination that Schware was not morally qualified to practice law and was rightfully excluded from the bar examination. The Court stated:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner *or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.* * * * Even in applying permissible standards, officers of a State cannot exclude an applicant *when there is no basis for their finding that he fails to meet these standards* . . . Id. at 238-239, 77 S.Ct. at 756. [Emphasis added.]

The Supreme Court has stated that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). This means not only protection of freedom of speech and association, but protection from arbitrary, discriminatory, and capricious actions in violation of due process. This position has been adopted and applied to non-tenured teachers by the Fourth Circuit in Johnson v. Branch, *supra*, and by Judge Doyle in Roth v. Board of Regents, 310 F.Supp. 972 (W.D.Wis.1970), and Gouge v. Joint School District No. 1, 310 F.Supp. 984 (W.D.Wis.1970).

[3] One of the primary reasons why due process protection must be applied is because of the grave consequences of non-renewal for a non-tenured teacher. Non-renewal, particularly under the facts in this case, is tantamount to dismissal. There is no doubt that non-renewal effectively prevents a teacher from obtaining another teaching position, thereby preventing a teacher from pursuing his chosen profession. In this case, the ramifications are even more broad because they extend to reputation. The action of the School Board brands the plaintiff at best as sexually promiscuous and at worst as a seducer of young school girls. When the ability to pursue a profession and reputation are involved, fundamental constitutional rights are to be strictly protected to prevent arbitrary state action. See *Schware, supra;* Birnbaum v. Trussell, 371 F.2d 672 (2nd Cir. 1966).

The court is cognizant of the fact that a School Board has wide discretion in the reasons for dismissal, but it is elemental that whatever reasons are given must be supported by facts. Some courts have established a "basis in fact" test for review of a School Board's decision not to renew a teacher's contract. In Gouge v. Joint School District No. 1, *supra*, the court held:

> [A] teacher in a public elementary or secondary school is protected by the due process clause of the Fourteenth Amendment against a non-renewal decision which is wholly without basis in fact and also against a decision which is wholly unreasoned, as well as a decision which is impermissibly based (such as race, religion, or exercise of First Amendment freedom of expression). Id. at 991.

Cf. Schware v. Board of Bar Examiners, *supra*. Other courts have employed a "substantial evidence" test. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Whatever test is applied to the facts of this case, it is clear that the action of the superintendent and the School Board was arbitrary, capricious, without basis in fact, wholly unreasoned, and not based on substantial evidence. No investigation was made to determine the truth of the complaints of impropriety by any member of the Board or by Superintendent Tufts and the resultant rumors were completely unverified and unsubstantiated. Mr. Gowen, of course, is in a different position than the other members of the Board because his daughter had complained to the administration and had talked with him about the plaintiff. While a parent's concern and natural tendency to believe his child is understandable, the same concern also naturally tends to lessen objectivity. Objectivity is essential when a teacher's reputation and livelihood are at stake, and Mr. Gowen could have assured objectivity if he had abstained or disqualified himself from the vote.

[4] To dismiss a teacher on the basis of uninvestigated complaints and unverified rumors and to admit that the decision does not depend on the truth or falseness of the complaints and rumors is patently unjust, arbitrary, and capricious. If the possibility, let alone the probability of the truth of the facts involved is not known, a decision cannot be reasoned or based on substantial evidence. The implications of such a decision are frightening. It means that any student with a personal dislike for a teacher could bring his career to an end by a complaint wholly unjustified and unsubstantiated in fact. In the same sense, a malicious group in the community could start unsubstantiated rumors resulting in dismissal. Further, an administrator or another teacher bent on a personal vendetta could, by insidiously starting false rumors, bring about the dismissal of a totally innocent teacher.

It is to be noted that the decision not to renew was not based on improper conduct or for a bad reputation, but because plaintiff had "lost his effectiveness as a teacher in the district."[1] The evidence that the plaintiff had lost his effectiveness as a teacher in the district is non-existent. Superintendent Tufts unilaterally decided, and the School Board agreed, that the plaintiff had lost his effectiveness. The Principal of FMRHS, the only administrator who had talked both with the plaintiff and the girls and the only administrator in day to day contact with what was happening in the school, recommended that the plaintiff be renewed. Mr. Willis, and the teachers at the school who testified, including Miss LaBrie, the head of the plaintiff's department, did not believe that the plaintiff had lost his effectiveness. Certainly, Mr. Willis and Miss LaBrie were in a more advantageous position to judge the plaintiff's effectiveness than the superintendent and the School Board.

In short, the action by the superintendent and the School Board, without even minimal investigation and without any concern for the truth, presents a classic case of a violation of due process. As stated by the Supreme Court in Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956):

> There has not been the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process.
>
> * * * * *
>
> The State has broad powers in the selection and discharge of its employees, and *it may be that proper inquiry would show [the teacher's] continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here.* Id. at 559, 76 S.Ct. at 641. [Emphasis added.]

---

[1] Certainly, if the School Board and the superintendent thought that the plaintiff was making improper sexual advances on female students and the rumors of prior immoral behavior were true, the most logical step would have been immediate dismissal. This procedure would have required, however, that a full and fair hearing be held. See N.H.Rev.Stat.Ann., Ch. 189:13.

Drown, supra, holds that a hearing is not required for a non-tenured teacher. I do not construe it to hold that a School Board has an absolute right to dismiss a teacher without an inquiry or a proper inquiry to determine if legitimate grounds for dismissal exist. To hold that a superintendent and a School Board need make no inquiry as to the truth or falsehood of the facts underlying the reason proffered for dismissal would offend the most elemental concepts of justice.

Because the reason given by the Board for the plaintiff's dismissal is patently arbitrary, the inference is overwhelming that the action of the superintendent and the School Board was motivated primarily by the plaintiff's exercise of his constitutional rights of freedom of speech and association. The complaints by the three girls, all friends and one the daughter of a School Board member, the resultant rumors of past misconduct, and the telephone inquiries presented a convenient opportunity to the School Board and superintendent to comply with the March 15 statutory notice of non-renewal deadline and to rid themselves of an outspoken teacher who had criticized the superintendent and the Board in the press as well as at the school. The decision not to renew plaintiff's contract for the 1970-1971 school year violated his rights under the First and Fourteenth Amendments of the Constitution.

DAMAGES

[5] The defendants contend that their common-law immunity prevents the plaintiff from recovering damages. I hold that as far as the equitable prayer for relief is concerned, common-law immunity does not apply. See Gouge v. Joint School District No. 1, *supra.* Assuming, but not deciding, that good faith prevents the imposition of compensatory damages for back pay, I cannot hold that the defendants here acted in good faith.

[6] The plaintiff's uncontroverted testimony was that his salary would have been $7,650 for the school year 1970-1971 and that he lost at least one-third of his salary, or $2,550, as a result of being unemployed until December of 1970. The wages earned as a short order cook for the two weeks in the summer should not be deducted because there was no evidence that summer employment was prohibited by the School District. There was no medical evidence that the plaintiff had any pain and suffering nor was there any evidence on the extent to which his reputation in his community was damaged. Monetary damages for pain, suffering, and damaged reputation would, therefore, be wholly speculative. I am also of the opinion that punitive damages are not warranted.

Accordingly, the following order shall be entered:

(1) The decision of the defendant School District by its School Board members and its superintendent not to renew plaintiff's contract for the 1970-1971 school year violated the First and Fourteenth Amendments of the Constitution and is hereby declared null and void;

(2) The plaintiff is entitled to all the benefits of a 1970-1971 contract and is to be reinstated in the Fall Mountain Regional District forthwith;

(3) The decision not to renew plaintiff's contract is hereby expunged from plaintiff's record and the defendants are hereby restrained and enjoined from giving any effect to, or making any use whatsoever of, the decision not to renew herein declared null and void; and

(4) Judgment is entered for the plaintiff against the defendant School District, and individually against Stanley B. Tufts, Gordon Gowen, Paul F. Marx, Paul S. Cray, Robert C. Metcalf, and Newell E. Bishop in the amount of $2,550, plus the costs of this action. Assistant Superintendent Bellevance and the other members of the School Board named as defendants are excluded from this monetary judgment because they took no active part in the decision not to renew.

So ordered.

APPENDIX

APPENDIX A

STATE BOARD POLICY FOR ADMINISTRATIVE HEARING PROCEDURES UNDER NEW HAMPSHIRE RSA 189

I. Preamble

It is the express purpose of this policy to provide guidelines and procedures for a full and fair hearing before both the local School Board and the State Board of Education when hearings are required in accordance with RSA 189:13, 14-a, 14-b, and 32. It is recognized that these guidelines will not cover every situation, and a certain amount of flexibility must be allowed.

The State Board of Education reserves the right to be the final authority in interpreting and applying these rules. Harmless technical errors in the application of these rules without showing or prejudice to the party aggrieved shall not be grounds for overruling a decision.

II. Pre-hearing Procedures

A. If a teacher is not to be renominated or reelected to a teaching contract for the next school year, the Superintendent of Schools shall notify him or her in writing on or before March 15 if the teacher

(1) has a Professional Standards Certificate from the State Board of Education, and

(2) has taught for one or more years in the School District

B. Any teacher who has taught for three (3) or more years in the School District and who has been so notified may request in writing, within five (5) days of receipt of said notice.

(1) a hearing before the School Board and

(2) the reasons for failure to be renominated or reelected.

C. The School Board, upon receipt of said request, shall provide a hearing for the teacher within fifteen (15) days.

D. All written notices required by this policy and RSA 189:13, 14-a, 14-b, 31, and 32, except for the notice required by Paragraph II A (RSA 189:14-a), will be sent to the Superintendent of Schools as agent for the School Board, to the individual teacher, and, in notices to the State Board of Education, to the Commissioner of Education as its agent.

E. The word "teacher" is defined to mean any professional employee of any school district whose position requires certification by the State Board of Education as a professional engaged in teaching. Principals, assistant principals, librarians, and guidance counselors are also included within the definition of this term.

III. Hearings Before Local School Board

A. Rules and Procedures

1. All hearings afforded to teachers in accordance with RSA 189 shall be held pursuant to the provisions of RSA 91-A unless requested by the teacher to be in public session.
2. No stenographic services or transcripts of the hearing will be provided. However, the teacher may request that the proceedings be tape-recorded, and the School Board shall provide for the same. Stenographic services may be utilized at the expense of the requesting party.
3. Both parties may be represented by counsel at the hearing.
4. All witnesses except the parties principal to the action will be sequestered from hearings held in executive session and will be allowed to enter the executive session only for the purpose of testifying, and upon conclusion of the testimony shall immediately leave the hearing room. All testimony will be under oath or affirmation.
5. In all cases, the school administration* or its representative shall open the proceedings through the production of witnesses and documents.
6. Each party shall be afforded the opportunity to exa...ne each witness immediately following the direct testimony.
7. After each party has had an opportunity to examine a witness, members of the Board may question the witness.
8. Each party may offer such evidence as it desires, but irrelevant, immaterial, or unduly repetitious evidence will be excluded. Each party shall produce such additional evidence as the School Board may deem necessary to an understanding and determination of the issues. The School Board shall determine the relevance and materiality of the evidence offered; and strict conformity to legal rules of evidence shall not be necessary.
9. The School Board may receive and consider the evidence of witnesses by sworn statement, but shall give it only such weight as they deem it entitled to after consideration of any objections made to its admission. Witnesses should appear in person unless extenuating circumstances prevent them from such appearance. Exhibits, when offered by either party may be received in evidence by the School Board.
10. After the administration has presented its case, the teacher may then present his/her case and produce his/her witnesses for examination.
11. Rebuttal evidence may be presented by either party, limited to evidence previously submitted by the other party.

12. After all the evidence is submitted to the School Board, the teacher or his counsel will be given an opportunity to make a short summary of his case to the School Board. The administration will then be afforded an opportunity to present a short summary of its case to the School Board.
13. The school administration* or its representative shall have the burden of proving its case by a preponderance of the evidence.

* Or School Board, if the teacher was nominated but not reelected.

14. The School Board will then close the hearing and meet alone in executive session to deliberate and determine its course of action based solely on the evidence presented at the hearing. The School Board's legal counsel may be present during this deliberating session, but may not vote on the course of action to be taken.
15. The School Board shall forward forthwith its decision in writing to the teacher, but not later than fifteen (15) days after the close of the hearing. The decision shall list the pertinent facts found by the School Board in arriving at its decision. The letter to the teacher shall also advise the teacher of his/her right to appeal the decision. This decision will be forwarded to the teacher by certified mail, return receipt requested.

B. Appeal from Decision of School Board

1. A teacher aggrieved by a decision of the School Board may file an appeal with the State Board of Education for review thereof within ten (10) days after the issuance of the decision.
2. Such appeal must be in writing and filed with the Commissioner, Department of Education, State of New Hampshire, with a copy to the Superintendent of Schools.
3. The request for review must state in detail the reasons for the appeal. The request for review should specifically waive the fifteen-day requirement of RSA 189:14-b for decision by the State Board of Education.
4. If the Commissioner, Department of Education, determines that the request for appeal is too vague or general, he may, within five (5) days of receipt thereof, request in writing that the teacher file a more detailed statement of appeal within ten (10) days of receipt of the Commissioner's request. The Commissioner may also request the School Board to be more definite in its findings and written decision.
5. A teacher receiving such a request from the Commissioner must file the written appeal in accord with the requirement of the Commissioner's request within ten (10 days of the receipt thereof.)

6. Upon receipt of a satisfactory appeal, the Commissioner shall notify the State Board of Education and the local School Board of the request for review. A pre-hearing conference shall be set up in accord with paragraph IV A below.

IV. Hearings by the State Board of Education

A. Pre-hearing Conference

1. Within fifteen (15) days of receipt of a satisfactory appeal, the Commissioner shall set up a pre-hearing conference between the teacher, the Superintendent of Schools, and the Commissioner or his representative. Counsel for the parties may also attend this conference.
2. Three (3) days prior to the conference, each party shall submit to the Commissioner:
   a. A complete statement of the issues and the facts relating thereto.
   b. A written list of the names and addresses of all witnesses who may be called by each party.
3. At the conference, each party shall be prepared to consider:
   a. The simplification of the issues and an agreement on facts;
   b. A limitation on number of witnesses;
   c. Possibility of settlement; and
   d. Such other matters as may aid in the disposition of the action.
4. The Commissioner shall make an order which recites the action taken at the conference.

B. Review Board

1. The State Board of Education may appoint an **ad hoc** Review Board which is charged with the responsibility of conducting the hearing for a teacher who is entitled to the same in accord with RSA 189.
2. This Board shall consist of not less than three (3) members of the State Board of Education.
3. Hearings will be held in accordance with the regulations delineated herein.
4. After a hearing is held, the Review Board will issue a written report and its recommendation. If the vote of the Review Board is not unanimous, a dissenting opinion shall be included in the written decision. The report and recommendation shall be submitted to both parties prior to action by the State Board of Education sitting as a whole.
5. Upon receipt of the written decision of the Review Board, the Chairman of the State Board of Education will list the report as an item on the agenda of the next meeting of the State Board of

Education, for ratification by the State Board of Education. Prior to decision by the State Board of Education, each party will be allowed to address the Board with a short summary of its case.

6. After ratification or rejection of the Review Board's decision, the Chairman of the State Board of Education shall issue the final decision to the teacher and the School Board within fifteen (15) days after final determination. The decision of the State Board of Education shall be final and binding upon all parties.

C. Hearing Before Review Board

1. All hearings before the Review Board shall be held in executive session, and the public shall be excluded at the request of either party.
2. No stenographic services or transcripts of the hearings will be provided to a teacher. However, either party may request that the proceedings be tape-recorded and the Review Board shall provide for the same. That party will pay for the cost of the tape.
3. Either party may be represented by legal counsel at the hearing.
4. Articles III A 5, 6, 7, 8, 9, 10, 11, and 12 are incorporated herein by reference regarding the proceedings before the Review Board.
5. After all evidence and arguments have been submitted, the Review Board shall meet in deliberation. The Review Board will not substitute its judgment for that of the local School Board regarding questions of fact and in the event new and significant evidence is to be considered by the Review Board the case will be remanded for further proceedings. The Review Board may affirm the decision of the School Board or remand the case for further proceedings. The Review Board may reverse or modify a decision if substantial rights of the teacher have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
   a. in violation of constitutional or statutory provisions;
   b. in excess of the statutory authority of the agency;
   c. made upon unlawful procedure;
   d. affected by other error of law;
   e. clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
   f. arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
6. The Review Board shall submit its findings and recommendation to the State Board of Education not later than fifteen (15) days after the hearing. A copy of the findings and recommendation will be forwarded to each party forthwith. The case will be placed on the agenda of the next meeting of the State Board of Education,

provided that no case shall be on the agenda prior to ten (10) days after each party receives the findings and recommendation.

7. When the matter is brought up at the meeting of the State Board of Education, each party will be afforded ten (10) minutes to summarize its position. The State Board of Education shall issue its decision to the parties within fifteen (15) days after final determination.

APPENDIX B

RULES AND PROCEDURES GOVERNING A DISMISSAL HEARING

1. If requested by the petitioner, the hearing will be open to the public and the press, except as provided below.

   a. Observers from the public and the press are expected to adhere to strict rules of order and decorum. If cooperation in this respect fails, the hearing will be recessed until the room is cleared of all observers and the hearing will then resume in private.

   b. All observers will be seated, and when all seats are filled, the doors will be closed. There will be no standing by observers.

2. All witnesses except the petitioner and the administration will be sequestered from the hearing held in executive session, and will be allowed to enter the executive session only for the purpose of testifying, and upon conclusion of their testimony shall immediately leave the hearing room.

3. If requested by the petitioner, the proceedings will be tape recorded and the school administration will provide for the same. If the hearing is tape-recorded, all parties and witnesses should identify themselves before speaking.

4. The petitioner, the administration, and the School Board each have the right to be represented by counsel at the hearing.

5. All testimony will be under oath or affirmation.

6. The school administration will open the proceedings through the production of witnesses and documents.

7. Each party will be afforded an opportunity to cross examine each witness immediately following the direct testimony.

8. After each party has had an opportunity to examine the witness, members of the School Board may question the witness. However, the School Board must be very careful in wording its questions that it does not show any prejudice or partiality to either party to the proceedings.

9. While each party may offer such evidence as it desires, the Board reserves the right to exclude or limit evidence which it feels is irrelevant, immaterial, or unduly repetitious. Conformity to the rules of evidence is not necessary.

10. Witnesses should appear in person unless extenuating circumstances prevent them from such appearance. The School Board may receive or consider the evidence of witnesses by sworn statement, but shall give the sworn statements only such weight as they deem them entitled to after consideration of any objection made to their admission. Exhibits when offered by either party may be received in evidence by the School Board.

11. After the administration has presented its case, the petitioner may then present his case.

12. Rebuttal evidence may be presented by either party, limited to evidence previously submitted by the other party.

13. After all the evidence is submitted to the School Board, the petitioner or his counsel will be given an opportunity to make a short summary statement of its case to the Board. The administration will then be afforded an opportunity to present a short summary statement of its case to the Board.

14. The school administration shall have the burden of proving its case by a preponderance of the evidence. This means that the school administration is not required to prove its case beyond a reasonable doubt, but only needs to prove that it is a little more probable than otherwise that the evidence supports the administration's side of the case on the issues upon which it has the burden of proof.

15. After the summary statements, the School Board will close the hearing and meet in executive session to deliberate and make its decision. The Board's decision will be based solely upon the evidence presented at the hearing, except for such facts which administrative tribunals are customarily entitled to take judicial notice of. The Board's legal counsel may be present during its deliberations in executive session, but will not vote on the decision of the Board.

16. The School Board will forward its decision in writing to the petitioner as soon as it is made, but not later than fifteen (15) days after the close of the hearing. The decision shall list the pertinent facts found by the School Board in arriving at its decision. The letter to the petitioner advising him of the Board's decision should also advise him of his right to appeal the decision to the State Board of Education within ten (10) days. This decision will be forwarded to the petitioner by certified mail, return receipt requested.

Respectfully yours,

NIGHSWANDER, LORD, MARTIN & KILLKELLEY

By

Bradley F. Kidder

BFK:EFE

APPENDIX C

RECORD OF HEARING AND DECISION OF LOCAL BOARD

The Westbrook School Board, after carefully considering the testimony of all witnesses, the exhibits, and the petition of the students of Westbrook High School, has unanimously decided upon the following findings and decision.

FINDINGS:

1. The Westbrook School Board reaffirms its decision to eliminate three faculty positions from the Westbrook High School for the academic year 1975-1976, causing the elimination of one teacher from each of the following subject areas: mathematics, social studies, and English. The Board believes that it correctly exercised its discretion by discontinuing these positions.

2. The Westbrook School Board finds that of the five social studies teachers in the Westbrook High School, Hugh Anderson was certainly the worst and most ineffective teacher of the five.

3. While Mr. Anderson possessed an excellent background in his subject area, was generally well prepared, and worked well with college-bound students, he was unable to effectively work with and motivate the non-college bound students and was a marginal teacher in the area of teacher techniques. The Westbrook School Board further finds that if Mr. Anderson had been offered a teaching contract, he would not have been recommended for nor offered an increment raise during the 1975-1976 school year. The Westbrook School Board also notes that, when Mr. Anderson was confronted with these statements on numerous written evaluations, he did not contest or rebut these facts.

4. The Westbrook School Board finds that the discontinuance of a teaching position is a valid reason not to renew the teaching contract of a teacher with eight years in the Westbrook School District. Further, the Westbrook School Board finds that it is not required to create a position for Mr. Anderson, whose teaching position has been discontinued.

5. The Westbrook School Board finds that there is no "non-tenured" teaching position in the Social Studies Department at the Westbrook High School.

6. The Westbrook School Board finds that Mr. Anderson is certified by the State Board of Education only in the area of Social Studies.

7. The Westbrook School Board finds that there is a social studies position in the Westbrook Elementary School, grades 7 and 8, which is held by a first year teacher, to wit: John A. Saunders. Further, the Westbrook School Board finds that John Saunders is an outstanding teacher, as noted in his evaluation, which was made prior to the decision to cut the staff at Westbrook High School.

8. The Westbrook School Board finds that Mr. Anderson does not have any right to "bump" a teacher in another school, to wit: the Westbrook Elementary School.

9. The Westbrook School Board finds that the administration, through Superintendent Chesley, correctly exercised its discretion by not offering a contract to Hugh Anderson to teach in the position held by John Saunders in the Westbrook Elementary School.

DECISION:

The Westbrook School Board upholds the Superintendent's decision not to place Hugh Anderson's name in nomination for the 1975-1976 school year.

Respectfully submitted,
WESTBROOK SCHOOL BOARD

Richard F. Nelson, Chairman